

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

FINAL REPORT

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



This study was carried out for the European Commission by

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



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Abstract (EN)

This report reflects the findings of the Europe Economics-University of Amsterdam study on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works. It considers the current legal framework in Europe, assesses the economic mechanisms affecting the flows of income in the sector and identifies areas where differences between current national frameworks might interfere with the functioning of the Single Market. Drawing upon statistical analysis of a survey of authors to test and corroborate the findings of the legal analysis, the study draws a number of policy recommendations to improve the functioning of the Single Market in this area. The first policy recommendation aims at increasing legal clarity by specifying individual modes of exploitation and respective remuneration. The second policy recommendation limits the scope of transfer of rights for future works and future modes of exploitation thereby increasing clarity over the conditions under which these rights should be transferred. Lastly, the third policy recommendation enables non-employed but economically dependent freelancers to enjoy some of the benefits enjoyed by employees in a worker-employee relationship.

Abstract (FR)

Ce rapport reflète les conclusions de l'étude d'Europe Economics - Université d'Amsterdam sur la rémunération des auteurs de livres et de revues scientifiques, des traducteurs, des journalistes et des artistes visuels pour l'utilisation de leurs œuvres. Ce rapport considère le cadre juridique actuel en Europe, évalue les mécanismes économiques qui affectent les flux de revenus dans le secteur et identifie les domaines où les différences entre les cadres nationaux actuels pourraient interférer avec le fonctionnement du marché unique. Ce rapport se fonde sur une analyse statistique d'une enquête sur les auteurs afin de tester et corroborer les conclusions de l'analyse juridique. L'étude conclue sur un certain nombre de recommandations visant à améliorer le fonctionnement du marché unique dans ce domaine. La première recommandation vise à augmenter la clarté juridique en spécifiant de façon individuelle les différents modes d'exploitation ainsi que leur rémunération respective. La seconde recommandation limite la portée du transfert de droits portant sur des œuvres futurs et modes d'exploitation futurs de façon à apporter davantage de clarté sur les conditions sous lesquelles ces droits doivent être transférés. Enfin, la troisième recommandation permet de remettre aux travailleurs free-lance non salariés mais économiquement dépendants de bénéficier de certains des avantages dont bénéficient les employés dans une relation travailleur-employé.

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 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

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).

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

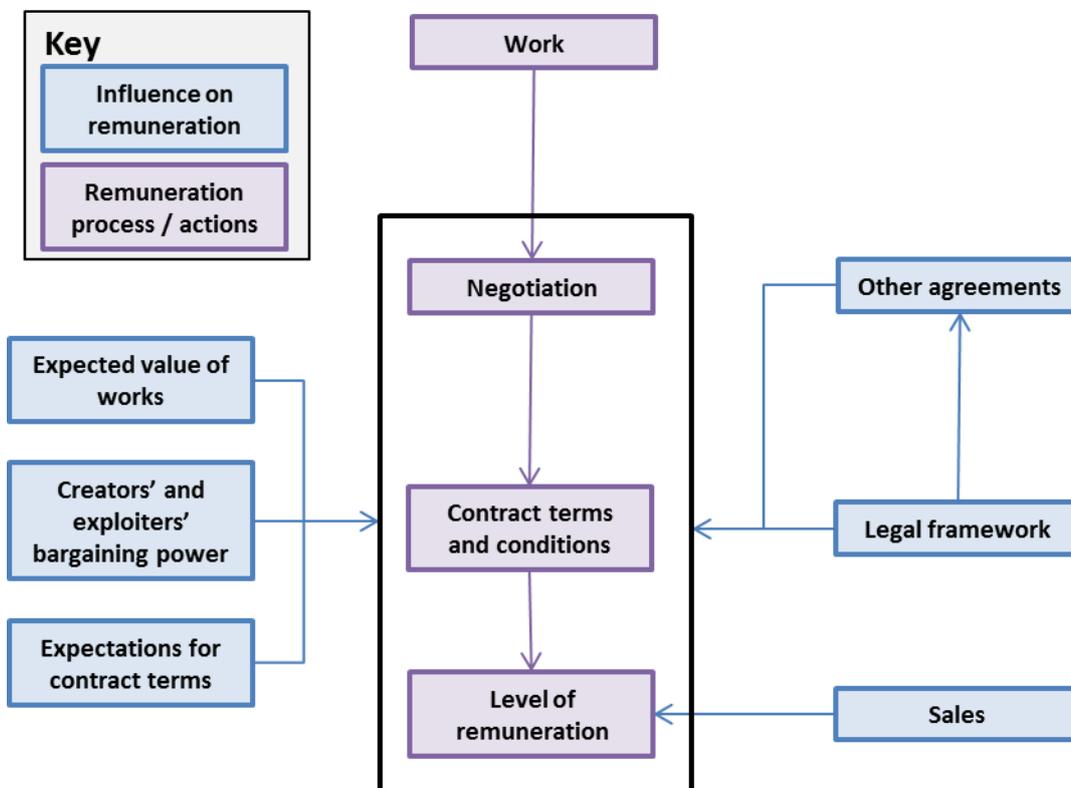
difficult for authors (as well as others operating in the industry) to fully understand the source of and rights associated with the remuneration they receive.

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 CROs 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.

Sommaire

DG Connect a commandé à Europe Economics et à l'Institut du droit de l'information de l'Université d'Amsterdam une étude sur la rémunération des auteurs de livres et de revues scientifiques, des traducteurs, des journalistes et des artistes plasticiens (tous les groupes sont dénommés ci-après les « auteurs ») pour l'utilisation de leurs œuvres indépendantes³.

Les objectifs généraux de cette étude sont d'analyser la situation actuelle concernant le niveau de rémunération versée aux auteurs afin de comparer les systèmes nationaux de rémunération des auteurs existants à l'heure actuelle et d'identifier les avantages et les inconvénients relatifs de ces systèmes pour eux. Nous avons également pour objectif d'évaluer le besoin d'harmoniser les mécanismes relatifs à la rémunération des auteurs et d'identifier les mécanismes les mieux adaptés pour atteindre cet objectif. Nous examinons également l'impact potentiel sur le fonctionnement du Marché intérieur.

Pour ce faire, nous nous concentrons particulièrement sur:

- les auteurs de livres, notamment les ouvrages de fiction, la littérature non romanesque, les livres pour enfants et adolescents, les ouvrages universitaires et pédagogiques;
- les journalistes, notamment la presse écrite (c.-à-d. les journalistes de la presse écrite, des magazines, des périodiques et les journalistes web) mais aussi audio-visuelle (c.-à-d. les journalistes reporters d'images et radio);
- les auteurs d'articles dans les journaux scientifiques/universitaires;
- les traducteurs, y compris à la fois les traducteurs littéraires (c.-à-d. traductions de poèmes, de romans, d'articles de journaux et de magazines, traductions publicitaires et commerciales) que les traducteurs audio-visuels (c.-à-d. script de voix hors-champ, doublage, sous-titrage en direct des émissions en direct, sous-titrage pour les sourds et malentendants et descriptions audio pour les aveugles et les mal-voyants);
- artistes plasticiens, y compris les photographes, illustrateurs et dessinateurs.

Le cadre juridique actuel

Pour effectuer notre analyse juridique, nous nous sommes adressés à des correspondants, à un éventail diversifié d'universitaires et d'avocats dans chacun des dix pays concernés par l'étude.⁴ Ces pays ont été choisis pour refléter les différences dans les approches règlementaires et les particularités régionales existantes. Le questionnaire que nous avons préparé pour nos correspondants portait sur le cadre juridique de chaque pays, tant du point de vue du droit des contrats (*lex generalis*) que du point de vue du droit d'auteur (*lex specialis*). Il visait également à déterminer les pratiques contractuelles réelles en cours dans les pays ainsi que leur conformité ou non avec la loi.

³ Les rémunérations salariées reçues par les auteurs dans le contexte d'un contrat de travail étaient au-delà de la portée de l'étude.

⁴ Les États membres concernés sont: le Danemark, la France, l'Allemagne, la Hongrie, l'Irlande, l'Italie, les Pays-Bas, la Pologne, l'Espagne et le Royaume-Uni. Nous remercions nos correspondants pour leurs contributions à l'étude: Pr Maurizio Borghi et Mme Evangelia Papadaki (Royaume-Uni, Université de Bournemouth); Dr Till Kreutzer (Allemagne, iRights.Law, Berlin); Dr Brad Spitz (France, YS Avocats, Paris); Mme Linda Scales (Irlande, Dublin); Mme Deborah de Angelis (Italie, DDA Studio Legale, Rome); Pr Raquel Xalabarder Plantada (Espagne, *Universitat Oberta de Catalunya*, Barcelone); Dr Tomasz Targosz (Pologne, Truple Konarski Podrecki & Partners Law Firm, Cracovie); Mme Maria Fredenslund (Danemark, RettighedsAlliancen, Copenhague); Dr Aniko Grad-Gyenge (Hongrie, ProArt Alliance for Copyright, Budapest).

En règle générale, les auteurs jouissent, en vertu de l'*acquis* européen, des droits exclusifs de reproduction, de communication au public, et de distribution et de location. Ces droits sont communément transférés aux éditeurs et diffuseurs, dans le cas des journalistes audio-visuels et des traducteurs, contre le paiement d'une rémunération. Les auteurs jouissent également du droit de recevoir une rémunération pour le prêt public de leurs œuvres, ainsi que du droit d'être rémunérés pour les actes de reproduction par reprographie, copie privée et, dans certains États membres, pour une utilisation pédagogique. Cette rémunération est généralement administrée par les CRMOS; en fonction de la législation et de la pratique contractuelle suivie dans chaque État membre, cette rémunération peut être affectée ou non à l'éditeur.

Sur la base des réponses fournies par les correspondants dans les dix juridictions, il apparaît que les dispositions générales du droit des contrats jouent un rôle très limité dans le soutien apporté aux auteurs quant à la négociation des accords d'exploitation et la détermination du niveau de rémunération dans les pays étudiés. Certaines règles du droit des contrats peuvent affecter la façon dont un contrat est interprété ou exécuté, mais en règle générale, elles n'ont pas d'influence sur le résultat de la négociation portant sur le transfert des droits ou la rémunération à verser. Toutefois, les lois sur les droits d'auteur de certains États membres, comme la « *lex specialis* » des règles générales du droit des contrats, fournissent bien aux auteurs un certain soutien dans l'octroi des licences ou le transfert de leurs droits.

L'analyse du cadre juridique applicable aux contrats entre les auteurs et les éditeurs en Europe montre une situation fragmentée entre les différents États membres et dans les secteurs de l'industrie (littérature de fiction, non romanesque, pédagogique, traductions, nouveaux services, illustrations, etc.). Deux facteurs principaux influencent le niveau de rémunération des auteurs:

- l'existence de dispositions législatives, principalement dans la loi sur les droits d'auteur, qui protègent les auteurs en tant que parties plus faibles au contrat; et
- l'utilisation de contrats types développés suite aux négociations entre les représentants des auteurs et les éditeurs (France, Espagne, Allemagne, Pays-bas, Royaume-Uni) ou sous la forme de conventions collectives rendues applicables aux travailleurs indépendants non employés mais économiquement dépendants.

Comprendre les flux de paiement

Les chaînes d'approvisionnement et les flux de paiement dans les secteurs couverts dans cette étude impliquent un certain nombre d'acteurs et varient à la fois entre les différents types d'auteurs et entre les États membres.

L'objectif de cette analyse était de clarifier la relation entre les auteurs et les divers acteurs impliqués dans la chaîne d'approvisionnement, dans le processus consistant à identifier de potentiels problèmes affectant le fonctionnement du marché et à clarifier, comme cela a été étudié dans les tâches ultérieures, l'impact potentiel des déséquilibres dans le pouvoir de négociation et les recours juridiques possibles. Nous identifions d'importantes contreparties qui interagissent avec les auteurs, le rôle qu'elles jouent dans la cession ou le transfert des droits et la rémunération correspondante, et dans l'étude des différences qui existent parmi les États membres.

À cet effet, nous présentons les principaux acteurs impliqués dans les secteurs liés aux catégories d'auteurs couverts dans cette étude et nous planifions leurs interactions. En planifiant de cette manière la structure de la chaîne d'approvisionnement, nous pouvons comprendre les flux de paiement au sein du secteur, et par conséquent comprendre le rôle que le système lui-même joue dans la détermination de la rémunération des auteurs.

Il existe un certain nombre de relations complexes dans ces secteurs. Les principaux acteurs et la façon dont les produits atteignent les consommateurs dépendent du secteur et du type d'auteur impliqué (par ex. les auteurs de livres par rapport aux photographes). En outre, les auteurs qui rejettent la voie traditionnelle pour la vente de leurs produits doivent interagir avec un ensemble d'acteurs différents et peuvent faire face à différents systèmes en termes de gestion des droits et de rémunération. Nous prenons en considération les principales relations pour chaque groupe.

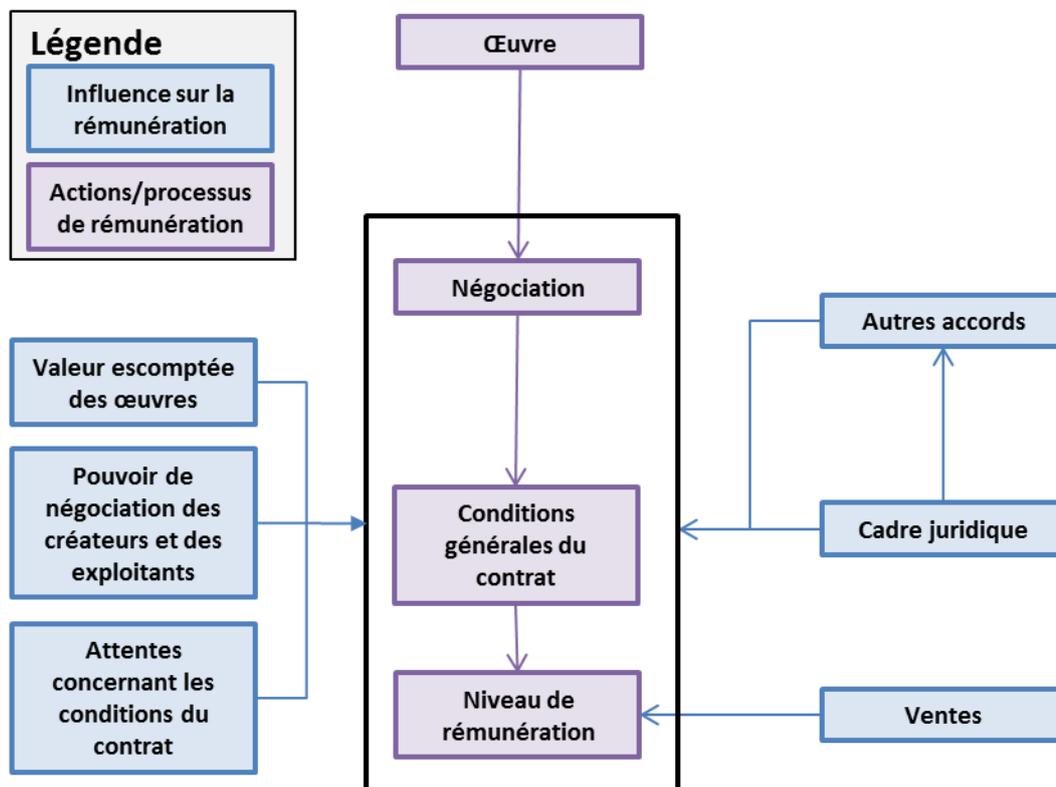
L'analyse a fourni deux aperçus importants pour la détermination de la rémunération des auteurs. Tout d'abord, dans la plupart des cas, le niveau de rémunération que l'auteur gagne dépend du contrat négocié avec l'éditeur/le diffuseur en échange d'un transfert de leurs droits exclusifs. Ensuite, les auteurs (ainsi que d'autres opérant dans le secteur) peuvent avoir des difficultés à comprendre totalement la source de, et les droits associés à, la rémunération qu'ils reçoivent à cause de la complexité des chaînes et des flux de paiement associés.

Approche analytique

Il existe une série de facteurs supplémentaires qui peuvent affecter le niveau de rémunération des auteurs. Ensemble, ces facteurs forment un cadre théorique permettant d'examiner les données rassemblées par l'intermédiaire de l'examen juridique et de l'enquête auprès des auteurs.

Le cadre théorique était conçu pour être de nature générale afin d'englober tous les types d'auteurs dans les secteurs à la fois de l'impression et de l'audio-visuel et provenant de n'importe quel État membre. Par conséquent, il a été simplifié. Cette partie présente un aperçu du processus de détermination du niveau de rémunération reçue par les auteurs et elle identifie les principales influences sur leur rémunération, comme les attentes quant à la valeur de l'œuvre, le pouvoir de négociation, les attentes ou les normes en matière de contrat et le cadre juridique en place.

Figure 1: Processus de haut niveau visant à sécuriser la rémunération



Source: Europe Economics.

Nous avons analysé et qualifié l'impact attendu de chacun de ces facteurs sur le niveau de rémunération atteint par les auteurs dans leur contrat.

L'analyse statistique

Au cours de l'étude, nous avons rassemblé des données primaires sur la rémunération et les caractéristiques des auteurs afin de mettre la théorie en pratique. Pour faciliter la collecte de ces données, nous avons développé quatre enquêtes en ligne (une pour les auteurs de livres et de publications scientifiques, une pour les journalistes, une pour les traducteurs et une pour les artistes plasticiens) en consultation avec DG Connect et les instances représentatives au niveau européen. Les enquêtes ont été traduites dans la langue officielle des pays choisis pour l'étude et mises en ligne sur la plateforme d'enquête de l'UE. La diffusion de l'enquête a été facilitée par la coopération des instances représentatives des auteurs tant européennes que nationales.

Le résultat de la collecte des données a fait l'objet d'un certain nombre de limites. Tout d'abord, la méthode de diffusion signifiait que nous n'avions aucun contrôle sur la représentativité de l'échantillon, à la fois sur l'ensemble des États membres et au sein de chaque État membre. Par conséquent, il existe des différences significatives dans les nombres de réponses entre pays, et nous avons peu de moyens d'évaluer dans quelle mesure les réponses reçues de chaque pays sont représentatives de la population des auteurs dans ce pays. Ensuite, la nature « opt-in » (à option d'adhésion) de l'enquête peut avoir créé un biais dans les réponses à l'égard de ceux qui « ont du temps libre », et nous pouvons ne pas voir certains des auteurs les plus actifs.

En gardant à l'esprit ces limites, nos recommandations reflètent en premier lieu les conclusions de l'analyse juridique avec l'analyse statistique utilisée pour vérifier, examiner et corroborer les conclusions de l'analyse juridique, en signalant les domaines où les conclusions divergent potentiellement.

La principale approche de l'analyse statistique

Le principal objectif de l'analyse statistique est de comprendre l'impact des cadres juridiques sur la rémunération des auteurs. Ceci a été possible en élaborant des « indicateurs juridiques » qui identifient si certaines dispositions cruciales de la loi sur les droits d'auteur s'appliquent à un État membre, ainsi qu'un « indicateur de négociation collective » basé sur notre compréhension du rôle des syndicats, de l'existence des contrats types et sur le fait de savoir si la législation étend également aux non-membres les conditions générales applicables aux membres des conventions collectives.

Les niveaux de rémunération des auteurs rassemblés au cours de l'enquête ont ensuite fait l'objet d'une analyse par régression par rapport à ces indicateurs et un ensemble de variables de contrôle susceptibles d'influer également sur les rémunérations (par ex. la typologie de l'auteur, ses années d'expérience, si l'on a recours à un agent ou un représentant intermédiaire, etc.).

Les principales conclusions de l'analyse juridique indiquent que, parmi l'ensemble des dispositions légales prises en considération [c.-à-d. (1) les limites sur la portée du transfert des droits, (2) les limites sur des œuvres futures, (3) les limites sur de futurs modes d'exploitation, (4) les règles relatives à la forme des paiements (5) les formalités concernant le transfert des droits, (6) les obligations de publier/de non usage, (7) la clause best-seller], les trois premières sont celles qui ont probablement le plus grand impact sur la rémunération. Afin d'analyser d'un point de vue statistique si cela est le cas, nous élaborons deux indicateurs juridiques séparés: un « indicateur principal » (basé sur les dispositions (1)-(3)) et un « indicateur complémentaire » ((basé sur les dispositions (4)-(7)). Les résultats statistiques

corroborent les résultats de l'analyse juridique: l'indicateur « principal » a un impact positif et significatif d'un point de vue statistique sur les niveaux de rémunération des auteurs, alors que l'indicateur « complémentaire » n'en a pas.

L'analyse statistique ne corrobore cependant pas les conclusions juridiques concernant l'impact potentiellement positif de l'utilisation des contrats types et des conventions collectives sur la rémunération. La raison est que l'« indicateur de convention collective » n'a pas d'impact significatif d'un point de vue statistique sur les niveaux de rémunération.

Les principales conclusions

Les principales conclusions de notre analyse sont:

- Les obligations relatives à la portée du transfert - la mesure de protection dotée de l'effet positif le plus grand sur la situation contractuelle et la rémunération des auteurs se rapportent à l'obligation imposée aux éditeurs de spécifier la portée du transfert des droits (portée géographique, durée et modes d'exploitation) ainsi que la rémunération correspondante. Cette conclusion a été corroborée par l'analyse statistique.
- Formalités, obligations et mesures correctives - toutes sortes d'autres mesures existent dans les législations des États membres qui se rapportent soit à l'exigence de formalités au moment de la conclusion du contrat, soit aux obligations concernant l'exécution (par ex. les clauses de « non-usage » ou de « best-seller ») et la résiliation du contrat. Tandis que ces mesures contribuent également à renforcer la position des auteurs dans leur relation contractuelle avec les éditeurs, elles n'ont pas le genre d'impact direct et franc sur la rémunération qui peut être observé dans une restriction de la portée du transfert. Cette conclusion a été corroborée par l'analyse statistique.
- Les contrats types et les négociations collectives - l'utilisation des modèles types, développés suite aux négociations entre les représentants, et de la convention collective, développée avec le soutien des CRMOs agissant en tant que syndicats, a aussi été identifiée comme ayant un impact potentiellement significatif sur la rémunération. Dans la pratique, les contrats types seraient censés influencer sur la rémunération étant donné qu'ils facilitent la négociation et la conclusion des accords entre les auteurs et les éditeurs. Toutefois, l'analyse statistique n'a pas été en mesure de corroborer cette conclusion. Il y a deux explications possibles de cette divergence. La première est technique et repose sur le fait que la nature statique de l'ensemble des données transversales (qui fournissent un « instantané » des niveaux de rémunération pour tous les types d'auteurs et d'États membres, à un point donné dans le temps) ne permet pas une analyse dynamique de l'impact des contrats types sur les conditions de rémunération au fil du temps. La seconde est conceptuelle et repose sur la réflexion selon laquelle, alors que les conventions collectives peuvent avoir un impact positif sur la rémunération des auteurs employés, il se peut qu'elles n'y parviennent pas pour les indépendants.

Aspect du marché interne

Nous constatons que les incohérences présentes dans les législations régissant les dispositions contractuelles entre auteurs créent le risque de segmenter le marché interne. Les auteurs travaillant dans plusieurs États membres peuvent être désavantagés dans les États membres où le cadre juridique leur donne moins de certitude et de confiance quant à leur position de négociation et leurs droits contractuels que dans d'autres pays, par rapport aux auteurs basés dans ces États membres qui connaissent probablement mieux les résultats pratiques de ces règles et qui sont avantagés.

De plus, la présence de différents cadres juridiques fournit aux éditeurs une perspective de « sélection de juridiction » lors du choix des législations du pays en vertu desquelles les contrats

des auteurs doivent être appliqués. Cela peut avoir tendance à engendrer des possibilités d'arbitrage réglementaire.

Recommandations en matière de politique publique

Sur la base de ces conclusions, nous avons développé trois options de politique globale pour fins d'examen. Pour certaines des questions identifiées, une approche au niveau de l'UE peut être nécessaire, par exemple lorsqu'il existe une question spécifique au Marché intérieur. Pour les autres, l'intervention politique au niveau national peut aussi être efficace.

- Politique 1: Spécification de rémunération pour les modes d'exploitation individuels et les rémunérations respectives. Le principe général sous-tendant cette option de politique, conçue pour renforcer la position de l'auteur au moment de la négociation du contrat, serait d'introduire les exigences légales contraignantes suivantes; les contrats ne respectant pas les exigences seraient alors considérés comme nuls et nonavenus en vertu de la loi:
 - exigence de contrats écrits (dépendant de la loi régissant les contrats de l'État membre)
 - spécifier quels droits et modes d'exploitation sont transférés;
 - spécifier le niveau et le type de rémunération inhérents à chaque mode d'exploitation; et
 - une obligation de déclaration imposée à l'éditeur vis-à-vis de l'auteur.
- Politique 2: Limitation de la portée du transfert des droits pour des modes futurs d'exploitation, des œuvres, et les modes d'exploitation des futures œuvres. Afin d'assurer que les auteurs soient en mesure de négocier les conditions spécifiques à un nouveau mode d'exploitation, un contrat peut prévoir uniquement les domaines d'exploitation qui sont connus ou prévisibles au moment de sa conclusion. Le transfert des droits relatifs à des œuvres futures doit aussi être restreint en termes de durée et en termes de genre d'œuvre couverte par le transfert.

Politique 3: Permettre aux indépendants économiquement dépendants de demander le statut et de bénéficier des droits d'un employé. Il existe des situations dans lesquelles des travailleurs théoriquement indépendants, pour qui écrire est leur principale source de revenus, ont un très petit nombre de clients, voire un seul, qui leur fournissent la majeure partie de leur flux de travail. Dans certaines de ces situations, le travailleur « indépendant » travaille en fonction d'horaires réguliers dans les bureaux de l'éditeur, ou est étroitement suivi et réglementé par l'éditeur. Par conséquent, la réalité dans la pratique peut être celle d'une relation employé-employeur, et l'utilisation d'une entente contractuelle indépendant-client peut être conçue de manière à éviter les coûts associés à un statut d'employé, ou les obligations de reconnaître les droits à une convention collective. Nous recommandons par conséquent d'examiner les options afin de permettre à certaines catégories d'indépendants de profiter du statut et des droits des employés.

1 Introduction

Europe Economics and the Institute for Information Law at the University of Amsterdam were commissioned by the EU Commission's Directorate General for Communications Networks, Content and Technology ('DG Connect') to undertake a study of the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works (all groups are hereafter referred to as "authors").

1.1 Context and motivation for the study

The European copyright *acquis* confers authors a bundle of rights on their original works.⁵ This bundle of rights encompasses three categories of rights: exclusive rights, remuneration rights and moral rights.

Exclusive rights, economic in nature, are generally transferable. They confer on the owner the power to authorise or prohibit the reproduction, distribution and communication of the works to the public, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. Acts covered by these rights encompass material and immaterial, online and off-line, forms of exploitation of works. Because of the leeway afforded to Member States in the implementation of the European *acquis* in the national legal order, however, the exclusive rights tend to differ, both in nature and scope, between the Member States.

For example, on the basis of the Rental and Lending Rights Directive⁶ Member States *may* provide for a presumption according to which authors who have, individually or collectively, concluded a contract concerning film production with a film producer, are deemed to have transferred their rental right to the producer, subject to contractual clauses to the contrary. In such a case, authors retain an unwaivable right of remuneration for the rental of the audiovisual work (Article 5). In other words, the right of remuneration for the rental applies only in instances where the authors' right to make their work available to the public through rental has been transferred to a producer. With respect to the lending right, Member States can choose to implement this right as an exclusive public lending right or as a right of remuneration (Article 6).⁷ In most Member States the public lending right has been implemented as a remuneration right.

The '*monopoly of action*' granted to the author on the basis of exclusive rights is not present in the so-called remuneration rights. On the basis of remuneration rights, authors may not

⁵ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJ L 248, 6.10.1993, p15-21*; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

⁶ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *OJ 2006 L376/28*.

⁷ Article 6 states that '(...) Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending (...) 2. Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration. 3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2. Or be waived by authors or performers'.

oppose the use of their work, in exchange for which they have the right to receive remuneration. Remuneration rights may, or may not, be transferable or waivable, depending on the European *acquis* or the national legislation.⁸ Examples of remuneration rights are, as we have explained above, the rental and public lending rights, depending on the national legislation.

In addition to the remuneration rights, authors are entitled to receive '*fair compensation*' for certain acts authorised pursuant to a statutory exception or limitation, such as private copying, reprography and, in some Member States, educational or other uses.⁹ The level of '*fair compensation*' can be related to the possible harm to the rights holders resulting from the act in question. The transferability or waivability of fair compensation claims also depend on the national legislation.¹⁰

Moral rights, as originally recognised at supranational level by the Berne Convention, reflect the personal bond between the authors and their work. These rights are independent from the economic rights and are not transferable.¹¹ As moral rights are not harmonised at the European level, some Member States allow for a waiver under specific circumstances, e.g. United Kingdom ('UK') or Ireland, while others have made them not only inalienable but also perpetual, e.g. Italy and France.

The exercise of copyright has been left so far to be regulated at Member State level. In the absence of harmonised rules on authors' contract law in the European copyright *acquis*, rules vary significantly from one Member State to another. Some Member States like France, Italy, Spain and Germany have a long tradition of protecting authors as a weaker party in contractual relations with the parties responsible for the exploitation of their rights (e.g. publishers and broadcasters). In these countries, statutory measures have been adopted in addition to the general rules of contract law to strengthen the authors' position. These measures range from rules governing formalities for the conclusion of contracts; to rules imposing restrictions on the scope of transfers of rights (regarding future modes of exploitation or future works); rules obliging the payment of adequate or equitable remuneration; rules specifying how to interpret the (scope) of contracts; and rules determining the effect of transfers in relation to third parties, the duty to exploit the work and the termination of contracts.¹²

⁸ M.M.M. van Eechoud, P.B. Hugenholtz, S. van Gompel, L. Guibault, N. Helberger, "European Copyright Law – The Challenges of Better Lawmaking", Alphen a/d Rijn: Kluwer Law International, 2009.

⁹ For instance, for educational uses, compensation is not compulsory under EU law. Its implementation therefore depends on the Member State.

¹⁰ We note that CRMOs are calling for equitable remuneration rights in all cases where the rights have been assigned upfront, further to the Luksan case, where the CJEU decided in favour of the unwaivability of the right to fair compensation for private copying. Some remuneration rights are expressly unwaivable as per the European *acquis*, such as the one related to the transfer of the rental right. This means that authors and performers always retain their right to obtain payment for the exploitation concerned, even if they transferred other rights to the producer. But in other cases the law is silent on the waivable character of remuneration rights and the right to obtain payment of remuneration will be dependent on the contractual agreement with the publisher/producer, such as the lending right and the right of cable retransmission. CJEU decision, Case C-277/10 Martin Luksan v. Petrus van der Let, 9 February 2012, European Court Reports 2012 -00000, Celex No. 610CJ0277

¹¹ Article 6bis of the Berne Convention states that "Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honour or reputation". The Berne Convention is the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886.

¹² S. Dusollier et al., "Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States", study conducted for the European Parliament, 2014, and P.B. Hugenholtz, L. Guibault, "Auteurscontractenrecht: naar een wettelijke regeling?", Study for the department of Scientific Research and Documentation Centre (WODC) of the Dutch Ministry of Justice, August 2004.

In other Member States like the UK or Ireland, contracting parties are given the space to organise their contractual relations as they see fit on the basis of the general rules of contract law. There, the need to safeguard the principle of freedom of contract is deemed to prevail over the authors' demand for legislative intervention.¹³ In conformity with the age-old tradition of the common law system, according to which the parties, rather than the courts, are in the best position to assess what is good for them, no specific provision has ever been introduced in the copyright act to strengthen the authors' position.

Between these two extremes we find countries like the Netherlands, where until very recently authors benefitted from only limited support in the *Dutch Copyright Act ('Aw')*.¹⁴

Collective Rights Management Organisations ('CRMOs') play a role in establishing the level of remuneration received by authors, although the importance of this role differs by right holder, sector and even Member State. The role of CRMOs can be limited to the mere collection and distribution of remuneration or can include both the collection and distribution, as well as the actual exercise and enforcement of the right. In general terms, the exercise of exclusive rights can be individual or collective (either voluntary or compulsory),¹⁵ whereas the collection of the monies due for the remuneration rights almost by definition takes place on a collective basis (e.g. remuneration right for public lending and rental). Several rights are administered through such organisations either on a voluntary basis (like the owner's right to make available to the public), or on a compulsory basis (like the author's right to cable retransmission of broadcast works). CRMOs are also entrusted with the collection and distribution of monies owed for acts of reproduction for private purposes, reproduction by means of reprography and in some Member States, for educational uses.

In practice, before establishing relations of causality between the issues discussed above and remuneration, there are additional factors that need to be taken into account. These factors could be directly related to the implementation and enforcement of a particular right, but could also be related to external factors such as the financial state of an industry in a particular Member State, to differences in bargaining position, to the form of collection of remuneration, to the existence of model contracts etc. In the coming pages, we will therefore strive to establish relationships, both from legal and economic perspectives, which can support the doctrinal and empirical findings that will underpin our suggested policy options.

In addition to the differences in legal frameworks that can play a role in remuneration, the creative industries covered by this study are also experimenting with new business models. At a time when digital exploitation allows for an increasing number of business models, publishers and producers tend to demand very broad transfers of rights to allow them to exploit the works without impediments. The remuneration paid in return is not always perceived as commensurate to the breadth of the transfer. Authors may not be able to give counterweight to this type of practice. However, in some instances, changes in remuneration might also correspond purely to market circumstances and not to specific legal or contractual behaviours.

¹³ L. Bently, "Between a Rock and a Hard Place: The Problems Facing Freelance Creators in the UK Media Market-place", a briefing document on behalf of the Creators' Rights Alliance, 2002.

¹⁴ D. Peperkorn, "De lange geschiedenis van het auteurscontractenrecht", AMI 2010, 167. Continuing in this culture of deliberations, the Dutch Parliament has recently passed an Act amending the Dutch Copyright Act with a view to reinforcing the contractual situation of the author (a reform that had been pending since 2012). Future studies should be able to show what impact, if any, the new legislative landscape has on the contractual position of Dutch authors. B.J. Lenselink, "Het voorontwerp auteurscontractenrecht", AMI 2010, 159.

¹⁵ For example, at EU level, the cable retransmission right is an exclusive right, of individual exercise but subject to (compulsory) collective collection. The making available right is, in principle, an exclusive right, of individual exercise and individual collection, notwithstanding the fact that it can be transferred, assigned to and managed by a CRMO on a voluntary basis.

The recent dispute between Amazon and Hachette in the US has put the remuneration of authors of books under the spotlight.¹⁶ The very public dispute has highlighted the delicate balance between publishers and retailers, and the variety of business models available to authors in the digital age. The increase in sales of electronic reading media has given rise to an additional issue, that of *e-lending*. The complexity surrounding the topic arises from a number of factors including differences in the definition of e-books, national frameworks as well as the related copyright, technological and privacy issues. While *e-lending* is viewed favourably by libraries and users, it generates concerns for publishers as regards its potentially negative impact on the sales of books.¹⁷

Another hotly debated subject is that of *Open Access publishing*, which has primarily impacted on the traditional contractual relationships between authors of scientific articles and journal and book publishers.

Open access publishing has achieved prominence as a result of digitisation. Where the costs associated with the production and dissemination of electronic scientific publications are presumably much lower than those associated with print publications, the subscription prices charged by scientific publishing houses have been highlighted. In particular, libraries of higher education and research institutions are increasingly at odds to understand the need to pay, sometimes considerable, journal subscription fees to gain access to publicly-funded research output, including the research results that were obtained within their own institution. Additionally, they are often faced with having to pay compensation under existing exceptions and limitations to copyright, such as for acts of reprography and in some Member States, for educational use.

As a result, as Guibault explains, 'the principles of open access are rapidly gaining ground among academic institutions and public funding agencies. In view of the major social benefits that are expected to flow from compliance with open access principles in the area of scientific and scholarly publication, several higher education institutions and funding agencies, in and outside the European Union, have expressed a strong commitment to their promotion and application, some even going so far as mandating open access publication of publicly funded research results'.¹⁸

Undeniably, since the turn of the century Open Access has grown rapidly; especially in the UK, it gained a boost in 2014 when the Higher Education Funding Council (HEFC) for England announced that all UK research post-April 2016 must be Open Access in order to qualify for funding assessments. HEFC also announced that if university departments want research papers to be included in the next Research Excellence Framework then they have to be deposited in an Open Access repository within three months of the paper being accepted. The Netherlands and Italy, as we will explain, follow a very similar road to that of the UK. On the other hand, Open Access journals are less established than subscription ones and many are not being tracked for 'impact factors'.¹⁹ As reputation in academia is dominant currency, many scholars surrender financial rewards in favour of recognition. In that sense, traditional, well-established journals would still appear to have the upper hand today.

¹⁶ "Amazon vs Hachette: readers and authors take sides in publishing dispute", 12 August 2014, <http://www.theguardian.com/books/2014/aug/12/amazon-hachette-readers-authors-publishing-dispute>.

¹⁷ Significant research in this area has been undertaken by the International Federation of Library Associations and Institutions (IFLA).

¹⁸ L. Guibault, 'Owning the Right to Open Up Access to Scientific Publications', in L. Guibault & C.J. Angelopoulos (red.), *Open Content Licensing: From Theory to Practice*, Amsterdam: Amsterdam University Press, 2011, p. 137-167.

¹⁹ This may discourage young researchers to opt for open access, as their grants and career paths are highly dependent on publication record and they are often judged on the impact factors of the journals in which they publish. Source: <http://www.theguardian.com/higher-education-network/blog/2014/oct/27/-sp-whats-the-biggest-challenge-facing-open-access>.

In any case, we will provide some further insight into this subject, both from legal and from an industry perspective, in the coming pages.

Journalists, on the other hand, face a completely different array of issues. In some EU countries such as Belgium (outside the scope of this study), Germany, France and Spain, the practices of online news aggregators and their impact on journalists and newspaper publishers, have, in recent times, featured prominently in the news.²⁰ European newspaper publishers have stressed the need for news aggregators to pay fees to display content on their webpages: publishers hold firm to the idea that content providers must be fairly compensated for material used by others.²¹ News aggregators argue that theirs is not a commercial service.

Social media have, perhaps stating an obvious example, also had a considerable impact on the role of journalists; a survey carried out by the University of Oxford²² found that the labour conditions of freelance journalists are precarious and that journalists are therefore resorting to social media as marketing tool to provide them with visibility. Moreover, the advent of social media is likely to blur the classification of journalists as print, broadcast or online, moving to a broader concept of digital journalists.

Visual artists face similar challenges to those encountered by journalists. These relate primarily to the profound impact that new digital technologies have had on the practice and dissemination of visual artists' works.²³ In particular, the digital transition allows artists to replace physical objects with electronic files and to displace distribution over time and between places with instantaneous distribution over networks.²⁴ Moreover, advances in software and hardware applications raise concerns over the conservation of certain practices and works.

As far as translators are concerned, the growing prominence of mechanised translation services, such as *Google Translate*, has left many of them concerned about the future of their profession. Despite this concern, analysts looking at the market for translation services do not see these technical advancements as harmful to translators. This is due to the fact that artificial intelligence cannot replicate what human translators bring to the table as sufficient cultural experience is needed when translating in order to convey the 'niceties of language used'.²⁵

Despite the optimism on the language services market, driven by an annual growth rate of 11.3 per cent between 2008 and 2012, compensation trends for text-translators have been negative.²⁶ An analysis of salary levels of text translators in 23 European countries found that their annual income, relative to per capita purchasing power, in 20 of these countries is less than sixty percent of purchasing power standards.²⁷ The same analysis notes that 48 per cent of translators involved in studies conducted by the *European Council of Literary Translators*

²⁰ News aggregators will be analysed in Key Players section. Further, to the extent available, we will also tackle any legal and contractual implications of the use of journalistic works by news aggregators.

²¹ Source: <http://www.theguardian.com/world/2014/dec/16/google-news-spain-publishing-fees-internet>.

²² University of Oxford, "Journalism in the age of social media", <http://www.theguardian.com/world/2014/dec/16/google-news-spain-publishing-fees-internet>.

²³ See e.g. Canadian Public Arts Funders (2011) "Digital transitions and the impact of new technology on the arts".

²⁴ For instance, Google Art Project offers detailed images of visual artwork in major international museums.

²⁵ Klein, Karen E, "The Translation Industry Interprets 'Recession-Proof'" *Bloomberg.com*. Bloomberg, n.d. Web. 17 June 2015.

²⁶ Common Sense Advisory, "The Language Services Market". Annual report, with latest version available at <https://www.commonsenseadvisory.com/AbstractView.aspx?ArticleID=21531>.

²⁷ Pym, A, Grin, F, Sfreddo C, Chan A, (2013), "The Status of the Translation Profession in the European Union", p99.

Association ('CEATL') and the *Institute of Translating and Interpreting* ('ITI'), are earning the same or lower income compared to what they earned five years before.²⁸

1.2 Objectives and scope

The object of this study has been to determine the current situation regarding the level of remuneration paid to authors of books and scientific journals, translators, journalists and visual artists for the use of their works, and to issue policy recommendations to improve it, if necessary. Specifically we have focused 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);
- photographers;²⁹
- illustrators; and
- designers.

The study has included an assessment of different national approaches and mechanisms to ensure remuneration for authors for the exploitation of their works and to determine whether, and to what extent, the differences that exist among the Member States affect levels of remuneration. Based on a thorough economic and legal analysis, we offer parameters for policy makers to decide whether the legal framework should be adapted, and if so, how. Specifically, we have completed the following tasks:

1. Mapping the current legal situation regarding the rules applicable to transfers of rights and the payment of remuneration to authors of books and scientific articles, translators, journalists and visual artists, contractual practices and negotiation practices in the United Kingdom, France, Germany, Italy, Spain, Poland, Ireland, the Netherlands, Hungary and Denmark.
2. Providing economic data on the actual levels of remuneration in the on-line and off-line environment in those countries for authors of books and scientific journal articles, translators, journalists and visual artists.
3. Providing an analysis of the systems present in the chosen Member States in order to assess the remuneration of the selected categories of authors of books and scientific articles, translators, journalists and visual artists, including an assessment of the relative value of initial contracts and subsequent remuneration where applicable.
4. On the basis of the analysis, proposing detailed policy options designed to ensure adequate remuneration for authors of books and scientific articles, translators, journalists and visual artists and assess the effect that the different options would have on the existing distribution models as well as on the delivery of multi-territorial services in the EU.

This study has thus focused upon the rules applicable to exploitation contracts concluded and on the level of remuneration paid to authors of books and scientific articles, translators, journalists and visual artists. To this end, we have examined, with respect to the Member States mentioned above, the legal provisions, case law, contractual and negotiating practice

²⁸ Pym, A, Grin, F, Sfreddo C, Chan A, (2013), "The Status of the Translation Profession in the European Union".

²⁹ This category includes photo journalists.

and their practical outcome in terms of remuneration for authors of books and scientific articles, translators, journalists and visual artists.

1.3 Report structure

The report is structured as follows:

- Section 2: Current legal framework — this section sets out the key findings from our survey of legal experts in each of the countries included in the study.
- Section 3: Understanding of payment flows — this section provides an overview of the publishing industry and identifies the key players for all the different categories of authors covered in this study; this is done to explore their interactions and to identify the resulting payment flows to authors.
- Section 4: Analytical approach — this section sets out the approach that will be adopted for the analysis of authors' remuneration.
- Section 5: Approach to statistical analysis — this section describes our approach to the statistical analysis, including our data collection processes and key indicators used in the statistical analysis.
- Section 6: Statistical analysis — this section presents the results of our statistical analysis.
- Section 7: Key findings — this section explores the key findings from this research, in terms of the legal review, conceptual exploration of the issues and statistical results.
- Section 8: Policy recommendations – this sections develops our policy recommendations based on our key findings.
- Appendices:
 - Appendix 1: Distribution list for remuneration survey – this is a list of all the national organisations that we have contacted to be involved in the distribution of the remuneration surveys.
 - Appendix 2: Remuneration survey – this contains the questionnaires that were distributed to authors.
 - Appendix 3: Legal questionnaire – this contains the legal questionnaires that were completed by the legal correspondents.
 - Appendix 4: Technical appendix.

2 Current Legal Framework

While the rules on substantive copyright law have been fairly well harmonised in the European *acquis*, those on authors' contract law have not. As a result, the content of exploitation contracts and the level of remuneration paid to authors vary considerably from one Member State to another.³⁰ This gives rise to a diverse landscape in the Member States. Some have adopted protective measures to the benefit of authors with respect to the scope of transfer of rights or the formation, execution, and interpretation of contracts concluded with broadcasters, publishers and other producers. Other Member States essentially leave it to the contracting parties, in accordance with the principle of freedom of contract, to negotiate the content of their agreement and the level of remuneration of authors. In a number of Member States, authors have regrouped in trade unions, freelance associations or are able to count on CMOs to provide support in the negotiation of contracts or the fixation of the level of remuneration.³¹

The analysis of the legal framework pertaining to authors' contract law in Europe is the cornerstone of this Study of the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works. This section examines the state of the law across ten selected Member States.³² In order to conduct our legal analysis, we approached correspondents, a mix of scholars and practising lawyers, in each of the ten countries under study.³³ These countries were chosen to reflect differences in regulatory approaches and existing regional idiosyncrasies – representing the common law and civil law systems, as well as the copyright and *droit d'auteur* systems, while at the same time providing a sample of legislative and judicial approaches to the regulation of authors' contracts. The correspondents provided answers to a questionnaire focusing not only on the relevant provisions of contract law (*lex generalis*) and copyright law (*lex specialis*), but more importantly on the actual contractual practice in their country, indicating whether this practice is aligned or not with the law.

Before delving into the contractual practices in each sector of the publishing industry (books and scientific journals, translators, journalists and visual artists) (section 2.3), we first explain the theoretical legal framework in force in the ten Member States examined (section 2.1). On the basis of the legislative statutes and their judicial interpretation, we describe the principles of ownership of rights (2.1.1), the bundle of rights granted to authors (2.1.2), and the general rules on transfer (2.1.3). Subsection 2.1.4 follows with a discussion of the most current legislative initiatives aiming at strengthening the position of authors in their contractual relationship with publishers and other exploiters. Section 2.2 examines the sector specific legislation that exists in a number of Member States, relating to publishing mainly.

³⁰ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11 July 2001, COM(2001) 398 final, Annex 1, p38.

³¹ S. Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, study prepared for the European Parliament, Committee on Legal and Parliamentary Affairs, PE 493.041, European Union, 2014.

³² The Member States covered for the data gathering are Denmark, France, Germany, Hungary, Ireland, Italy, Netherlands, Poland, Spain, and the United Kingdom.

³³ We thank our correspondents for their contributions to the study: Prof. Maurizio Borghi and Evangelia Papadaki (UK, *Bournemouth University*); Dr. Till Kreutzer (Germany, *iRights.Law*, Berlin); Dr. Brad Spitz (France, *YS Avocats*, Paris); Ms. Deborah de Angelis (Italy, *DDA Studio Legale*, Rome); Prof. Raquel Xalabarder Plantada (Spain, *Universitat Oberta de Catalunya*, Barcelona) Dr. Tomasz Targosz (Poland, *Traple Konarski Podrecki & Partners Law Firm*, Kraków); Ms. Linda Scales (Ireland, Dublin); Ms. Maria Fredenslund (Denmark, *RettighedsAlliancen*, Copenhagen); Dr. Aniko Grad-Gyenge (*Hungary ProArt Alliance for Copyright*, Budapest).

In the light of this framework, section 2.3 gives a portrait of the contractual practices concerning the exploitation of rights and the remuneration of authors of books and scientific journals, translators, journalists and visual artists. Section 2.4 describes other types of corrective mechanisms and obligations not mentioned in the discussion on the contractual practice. Section 2.5 analyses contractual clauses that are frequently perceived by members of associations as unfair. Section 2.6 explains how competition law impacts on the activities of trade unions and freelance associations. Finally, section 2.7 summarises our key legal findings.

2.1 Theoretical legal Framework

2.1.1 Ownership of rights

No author can transfer more rights than she³⁴ actually owns in respect of a particular work. The issue of the transfer of rights cannot, therefore, be analysed without first examining the legislative provisions dealing with the initial allocation of ownership of rights on protected works. The distinction between granting initial ownership or establishing a presumption of transfer in favour of another party is important, for in the latter case the transferee may not be endowed with the moral rights on the work and the presumption can be reversed by evidence or expressly set aside by contract. The rules regarding the ownership of rights in fact vary from one Member State to the next.

General rule of ownership

The laws of all Member States examined in this study recognise the *general rule* according to which the initial ownership of the copyright on a work is conferred on the natural person who created the work, following a principle known as the '*creator doctrine*'. With respect to the creation of books, scientific articles, translations, news articles, illustrations, cartoons and photographs, the '*creator doctrine*' is indeed the predominant rule for the initial allocation of rights on these works.

Further to the general rule described above, some exceptions to the *creator doctrine* have been introduced in the national legislation of several jurisdictions, mainly to account for the case of works created for the audiovisual sector or under employment, commission or collectively, for example.³⁵ These rules are explained in the subsections below.

Ownership of Audiovisual Works

The initial rights on works created for the audiovisual sector, e.g. audiovisual translations (subtitles, voice-over, dubbing), cartoons, computer animations or news reports, are initially vested in the natural person(s) who created them, unless such rights are presumed conferred either on the employer or on the producer of the audiovisual work. The producer of an audiovisual work will, in fact, be deemed the initial owner of the rights only in rare instances, where the contribution of the author of translations (subtitles, voice-over, dubbing), cartoons,

³⁴ Throughout this report, in order to avoid the repeated use of clumsy "he or she", "he/she", "her or his" or other similar constructions, we adopt the following (increasingly popular) convention. When referring generically to persons of either sex, the first such person encountered is referred to as "she", then if a second generic agent is introduced that second agent is referred to as "he". And similarly with "her" and "his".

³⁵ The laws of some Member States contemplate that the initial ownership of copyright can be conferred to legal persons. This assumption is already taken into account by EU regulation in, for instance, Article 1.4. of the Term Directive. An example is that regarding collective works and press publishers in Spain. In the present study, however, we have focused on the level of remuneration of natural authors (e.g. the economic survey also targets individuals). In any case, it would be difficult to compare levels of remuneration given that business models/position in the value chain and bargaining powers are different and thus, not easily comparable.

computer animations or news reports was accomplished before the completion of the audiovisual work.

According to the findings in the *Study on the remuneration of authors and performers for the use of their works and performances*,³⁶ the Copyright Acts of Denmark, Germany, France, Hungary, Italy, Poland, and Spain provide that, unless proved otherwise, the following persons are presumed to be the joint authors of an audiovisual work made in collaboration: 1) author of the script; 2) author of the dialogue; 3) author of the musical compositions, with or without words, especially composed for the work; 4) director. In France and Spain, the author of the adaptation is also identified as one of the authors of an audiovisual work. The UK, on the contrary, provides a much narrower scope whereby only the producer and the principal director are considered authors of a film, as per Section 9(2) of the Copyright Act ('CDPA'). In Ireland, Section 21 of the Irish Copyright Act ('CRR') follows the same approach as the UK. Audiovisual translators and audiovisual journalists do not fall under these categories.

By contrast, in the Netherlands, rather than referring to the four categories of authors, Article 45d of the Aw defines the makers of a film work as the natural persons who have made a contribution of a creative nature to the creation of the film work. This may therefore include the cartoons, computer animations or news reports, if they qualify as original contributions in the work.

Employer/employee relationship

A very significant exception to the '*creator doctrine*' found in the legislation of a number of Member State concerns works created by an employee in the course of her employment and in the fulfilment of a task. In such circumstances, the rights on the works are deemed conferred on the legal person who invested in their production, e.g. the employer. Depending on the law of the Member State, employers may be conferred the rights on the works created under employment either through a rebuttable presumption of transfer of rights in their favour (Denmark, Spain) or through a provision declaring them to be the owner of the rights *ab initio* (Ireland, The Netherlands, UK).

In Denmark, Article 6 of the Copyright Act states that ownership of works made under employment relations is granted to the person who creates the work. In the absence of any other agreement, ownership is transferred to the employer by virtue of the employment, when (i) there is a permanent and regular relation of employment, and (ii) the work is created as a part of the employment contract.

In Spain, the Spanish Copyright Act ('TRLPI') provides for several statutory presumptions of transfer of rights, similar to that of audiovisual works, among which, the presumption in favour of the employer or commission-based situations.³⁷ According to Article 51, in line with Danish provisions, the transfer of the exploitation rights in a work created by virtue of an employment relationship is governed by the terms agreed upon in the contract, which shall be made in writing. In the absence of an agreement in writing, a presumption of transfer of the exploitation rights to the employer will apply.³⁸

Following a different legal construction, in the Netherlands, Article 7 of the Aw provides that employers are considered the author of a work made by an employee, when her labour

³⁶ *Remuneration of authors and performers for the use of their works and the fixations of their performances*, Study prepared for the European Commission, DG Communications Networks, Content & Technology, by Europe Economics and IViR, July 2015.

³⁷ Other statutory presumptions would include works of art and photographic works.

³⁸ It is commonly accepted that this presumption of transfer also applies to works created by civil servants and other government officials, although they do not have an "employment" relationship with the administration or government. Yet, such relationship is characterised by the same elements as an employment relationship: creation is not spontaneous, but results from instructions or duties assigned by the employer, the author is subordinated to him and the result of her creative labour belongs to the employer or administration.

consists in the making of '*literary, scientific or artistic works*'. That is, the employer is the author and the copyright owner.

In the UK, the author of a work is the first owner of copyright in it, except where a literary, dramatic, musical, artistic work or film is made by an employee in the course of her employment under a contract of service or apprenticeship, in which case, subject to any agreement to the contrary, her employer is the first owner of any copyright in the work.

A similar rule applies in Ireland, where, ruled as an exception to the general rule, Section 32 (a) of the CRRA establishes that copyright vests in the employer, subject to any agreement on the contrary. This is, in turn, is subject to the proviso that the employee of the proprietor of a newspaper or periodical may use the work for any purposes, other than making it available to other newspapers or periodicals.

We will explain in the section dedicated to *Moral Rights*, how these are affected by the presumption of ownership established above.

In some Member States, like France, Germany, Italy, Poland and Hungary, instead of granting the rights to the employer, the law grants the employer an exclusive right to exercise the exploitation rights on the works created by employees.

In France, the general rule is that the first owner of copyright is the author of the work, even if the work is created by an employee in the framework of a labour agreement (Article L.111-1 paragraph 1 to 3 of the French Intellectual Property Act ('CPI')). Thus, in the context of an employment relationship, given that this shall in no way '*derogate from the general rule, under which the author is the first creator*', the author retains copyright.

In Germany, employers may only acquire derived exploitation rights, but not the author's right as such, which remains with the employee as the creator of the work. Contractual practice cannot change this fundamental rule of German copyright law. Section 43 of the German Copyright Act ('UrhG') merely establishes the rule that the exploitation rights concerning works created as part of an employment belong to the employer by default.³⁹

Italy is similar to the above. Italian Copyright Law ('LdA') provides that, while the author/employee retains the moral right on the work (e.g. the right to be recognised as author of the work) the employer is entitled to exercise the exploitation rights. In Poland, Article 12 of the Polish Copyright Act ('PrAut') also provides for a limited statutory transfer in favour of the employer: '*unless the law or an employment contract provide otherwise, an employer whose employee creates a work as part of his employment duty acquires, upon acceptance of the work, the author's economic rights within the limits resulting from the purpose of the employment contract and the mutual intent of the parties*'.

In Hungary, the employment contract is one of the few situations where Hungarian law makes possible the assignment of a significant part of the copyright, namely that covering the economic rights. In these cases, the original (natural) person, however, retains the moral rights.

Other Specific Rules of Ownership for Commissioned Works

In France, Germany, Italy, Poland and Hungary, the rights on works created on commission but outside of an employer/employee relationship follow the general rule of ownership, e.g. they remain with the natural person who created them.⁴⁰ The commissioner does not acquire rights unless they are specified in the agreement with the initial owner. Acquisition of rights on commissioned works can be agreed expressly or tacitly, based on the concrete circumstances, and this can imply certain restrictions on the initial owner's further possibilities to exploit the work.

³⁹ Fromm/Nordemann, Urheberrecht, 11th edition, Stuttgart 2014, § 43 UrhG, at 1.

⁴⁰ J. Seignette, Challenges to the creator doctrine, Deventer, Kluwer, 1994.

In France, as we explained above, the general rule is that the first owner of copyright is the author of the work, even if the work is commissioned or created by an employee in the framework of a labour agreement. Therefore, if a work is commissioned to an independent contractor, it is necessary to enter into an assignment agreement with the person who created the work.⁴¹ A specific case is that of '*works commissioned under an advertising agreement*', which follows an assignment mechanism whereby the author automatically assigns her rights to the '*producer*' of the advertisement, which is the person who or organisation that '*takes the initiative and responsibility for making the work*' (Article L.132-31 CPI and Article L.132-23 CPI), i.e. usually the advertiser (e.g. *Nestlé* or *Ford*) and not the advertising agency.

In Germany, also as in employment relationship, the commissioner of a work may only acquire derived exploitation rights, but not the author's right as such, which remains with the author as the creator of the work.⁴² Italy's rules for the commissioned party are also the same as for the employee: copyright (and moral rights) remains with the commissioned party but the initial owner of the exploitation rights is the commissioner.

In Poland there are no special rules concerning commissioned works: any rights have to be acquired contractually. In Hungary, the law is also silent as regards commissioned works. It is therefore reasonable to assume that pursuant to Article 4 of the Hungarian Copyright Act the creator doctrine applies and the copyright on commissioned works will remain with the author.

In Spain, the only reference in the TRLPI to commissioned works is to be found in Article 59(2) of the TRLPI: '*the commissioning of a work is not subject of a publishing contract, but any remuneration that may be agreed upon shall be considered an advance on the royalties accruing to the author from publication, if it occurs.*' Therefore, except where Article 8 of the TRLPI ('*collective works*') applies,⁴³ works created under commission do not benefit from any presumption of transfer of exploitation rights in favour of the commissioning party.⁴⁴ Nevertheless, according to general Spanish Civil Code ('*SCC*') contract rules, a transfer of rights might be inferred from the nature and purpose of the contract. According to Article 1258, a contract is binding on the parties in respect of all explicitly agreed stipulations as well as in respect of '*all other consequences which, deriving from its nature, are in accordance with good faith, custom and the law.*' Yet, so far, case law is not decisive.⁴⁵ Beyond that, it is generally accepted, according to the principle of good faith, that the commissioning party does acquire, at least and despite contractual silence, the right to use the work for the purposes it was commissioned for. Regarding moral rights, the courts have interpreted that the author should be given first a chance to make any changes necessary; if she does not, the commissioner may make them (subject to respecting the integrity right).⁴⁶

In the Netherlands, the status of commissioned works in the context of authorship and ownership is of special nature. The Aw does not provide for any presumption of ownership or authorship with regard to commissioned works that fall outside of any employment

⁴¹ An exception here would be (i) Automatic Assignments: Works commissioned under an advertising agreement: The author automatically assigns her rights to the '*producer*' of the advertisement, which is the person who or organisation that '*takes the initiative and responsibility for making the work*' (Article L.132-31 CPI and Article L.132 23 CPI), i.e. usually the advertiser (e.g. *Nestlé* or *Ford*) and not the advertising agency or the (ii) Presumption of Ownership in the case of Collective Works. Id., p. 148.

⁴³ As well as for performances made under commission (Article 110 TRLPI).

⁴⁴ Case law confirms that no presumption of transfer of exploitation rights derives from the commissioning of a work. See TS (Civil chamber) December 12, 1988 [Centro de Cálculo] Westlaw. ES RJ1988/9430.

⁴⁵ See TS (Civil chamber) December 18, 2008 [El Diario Vasco] Westlaw. ES RJ2009/534: the commission of a work implies (unless otherwise agreed by the parties) a transfer of exploitation rights in favour of the commissioning party.

⁴⁶ AP Salamanca (sec.1) July 12, 2004 [Cofradía] Westlaw. ES AC2004/1737: restoration of a deteriorated sculpture commissioned and used for religious events.

relationship.⁴⁷ However, Article 8 of the Aw vests the authorship and initial ownership in the legal entity under which name the work is made public.⁴⁸ According to Seignette, *'this provision may be understood as vesting authorship in commissioning parties. Over the years this provision indeed has become a broadly accepted means for commissioning parties to claim title to the copyright in all kinds of works commissioned by them'*. The case law on Article 8 Aw is controversial and has been criticised as creating a de facto allocation rule for copyright in commissioned works, depriving independent contractors of the benefits of copyright ownership.

In the case of Ireland, in so far as commissioned works are concerned, under an earlier piece of legislation (the Copyright Act, 1963) which was in force until January 1, 2001, the commissioner of a photograph, a painting or drawing of a portrait, or the making of an engraving was entitled to the copyright, and such copyright survived after 1st January 2001. However for other works and for all works created after 1st January 2001, the commissioner obtains no rights, except as may be expressly granted by the contract to commission or as may be implied by contract law. Case law on implied rights makes it clear that the commissioner has, at minimum, the right to use the work for the purpose for which it was commissioned. At maximum, the UK case of *Griggs Group v Evans*⁴⁹ could be used in an Irish court as an authority to ground the possibility that the commissioner has an *'equitable interest'* in the copyright. Indeed, the UK follows the Irish approach whereby the creator of the work is the original owner of copyright, unless otherwise agreed in writing. The existence of an implied licence might, nonetheless, and as we explain above, be construed by the courts.⁵⁰

In Denmark, similarly, the commissioner does not acquire rights unless they are specified in the agreement with the initial owner. However, the acquisition of rights to commissioned works can be agreed expressly or tacitly, based on the concrete circumstances, and this can imply certain restrictions on the initial owner's further possibilities to exploit the work. For example, with regard to portraits, the Danish Copyright Act, Section 60, provides that the initial owner of copyrights cannot exercise her rights without the consent of the person who commissioned the portrait.

Other Specific Rules of Ownership for Collective Works

In France, a collective work is a work created at the initiative of a person who or a legal entity that edits it, publishes it and discloses it under her direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, and without it being possible to attribute a

⁴⁷ There is a recent debate on some provisions in the Benelux Convention on Intellectual Property.⁴⁷ With regard to designs, Article 3.8(2) of the Benelux Convention provides that the commissioning party will be deemed as the designer when the commission was given with the intent of a commercial or industrial use of the product in which the design is incorporated. This also applies to unregistered designs.⁴⁷ Article 3.29 adds that the copyright relating to that design will belong to the party that is deemed the designer according to Article 3.8. To apply 3.29 in conjunction with 3.8(2), it is not required that the design is eligible for protection as such; it is sufficient that it is a design as defined in Article 3.1(2) of the Convention.⁴⁷ This means that the ownership of a commissioned work comprising 'the appearance of a product or a part of a product'⁴⁷, in principle, lies in the commissioning party. However, for this research the relevance of these provisions is limited.

⁴⁸ J. Seignette, Authorship, Copyright Ownership and Works made on Commission and under Employment, in Hugenholtz, Quaedvlieg and Visser (eds.), *A Century of Dutch Copyright Law*, Amsterdam, DeLex, pp. 115-140, at p. 134; art. 8 Aw reads: *'A public institution, an association, a foundation or a company that makes a work public as its own, without naming any natural person as the maker, is taken to be the maker of that work, unless it is proved that in the circumstances the making public of the work was unlawful'*.

⁴⁹ [2003] EWHC 2914 (CH).

⁵⁰ Also, in the UK, prior to 1 August 1989, the copyright, as in Ireland, in photographs, portraits and engravings (and only those types of work) which were created as a result of a commission were owned by the commissioner and NOT the creator; <https://www.gov.uk/guidance/ownership-of-copyright-works>.

separate right in the work as created to each author (Article L.113-2 paragraph 3 CPI). A collective work is the property of the person or legal entity under whose name it has been disclosed, unless proved otherwise, and the author's rights vest in such person or legal entity (Article L.113-5 CPI). Where a person or a legal entity takes the initiative of creating and publishing a collective work such as an encyclopaedia, a book, a newspaper, or even jewellery,⁵¹ the economic *and moral rights* will vest in that person or corporation.⁵²

Similarly, in Spain, subject to agreement to the contrary, all intellectual property rights in the collective work shall vest in the person who publishes it and discloses it under her name (Article 8(2) of the TRLPI).⁵³ Note that this person may not be the same who initiated and coordinated the collective work. Doctrinal debate continues as to whether this amounts to a vesting of authorship or only first ownership of all moral and exploitation rights. The impact is largely theoretical, but even if only first ownership is vested in the publisher, it remains a relevant (and exceptional) provision in Spanish law since it clearly allows granting moral rights to a legal entity. In any case, it is only a *iuris tantum* presumption, subject to agreement to the contrary: it could be agreed that despite being a collective work, some of the contributors (together or instead of the publisher) will be considered co-owners (not authors) of the collective work.

In any case, the category of collective work should be always applied with caution and restrictively;⁵⁴ its existence can only result from the factual circumstances involving the creation of the work.⁵⁵ However, it is controversial how restrictively it should be applied. Despite some attempts to restrict its scope to literary works,⁵⁶ doctrine and case law are open to accept it for any other works, such as works of art, multimedia works, and computer programs (in fact, Article 97(2) of the TRLPI leaves no room for doubt) and also architectural works.⁵⁷

Regarding exploitation rights in the contributions to the collective work, it is commonly *understood* (although nothing is expressly stated in Article 8 of the TRLPI) that they have been transferred to the publisher as part of the initial vesting of rights in the whole work in its favour set out by the same article. However, the scope of such an 'implied' transfer of rights is far from clear: whether it is restricted to the contribution 'as is' integrated in the collective work and to the extent necessary to exploit it or whether it also includes its independent exploitation or even transformation. In respect of contributions to periodical publications

⁵¹ Cass. civ. 1, 19 December 2013, [12-26409](#).

⁵² Cass. civ. 1, 22 March 2012, [11-10132](#).

⁵³ See AP Barcelona (sec. 15) March 28, 2006 [Sagrada Familia] Westlaw.ES AC2006/1723, qualified the Sagrada Familia (by Gaudí) as a collective work and granted moral rights protection to the legal entity in charge of building the temple, as the heir to Gaudí's estate. See AP Madrid (sec.10) December 13, 2004 [Canciones y Recursos Musicales] Westlaw.ES JUR2005/47867: the commissioning of a work as part of a collective work implies a transfer of all exploitation rights in favour of the commissioning party (here, the publisher).

⁵⁴ See TS (Civil chamber) July 11, 2000 [Proyecto IACU] Westlaw.ES RJ2000/4669: an architectonic project done at a university is qualified as an individual work, despite the fact that several professors and members (employees) of that university also participated in it. The Supreme Court found that the work was not a collective work because no evidence (about the relevance of the contributions by the other members) was produced to refute the *iuris tantum* presumption derived from a registration existing under the claimant's name, and because contributions to a collective work must be sufficiently relevant per se, in order to ascertain the existence of a collective work.

⁵⁵ See TS (Civil chamber) July 11th 2000 [Proyecto IACU] Westlaw.ES RJ2000/4669 and AP Madrid (sec.11) May 12th 2006 [Burladero] Westlaw.ES AC2006/932.

⁵⁶ For instance, relying on a restrictive interpretation of the term "published" in Article 8 TRLPI, as referring to the specific regime of publishing contracts in arts.58-73 TRLPI, the Intellectual Property Registrar only admits printed literary works (encyclopedias, newspapers, collections, etc.) to be registered as collective works.

⁵⁷ See AP Barcelona (Sec. 15) March 28, 2006 [Sagrada Familia] Westlaw.ES AC2006/1723 which granted protection on the Sagrada Familia, the unfinished church by Gaudí, as a collective work.

(which may often qualify as collective works), Article 52 of the TRLPI⁵⁸ provides for a clear answer: unless the parties have agreed otherwise, the authors of works reproduced in periodical publications shall retain their right to use them in any form that does not prejudice the normal exploitation of the publication in which the contributions have been inserted.⁵⁹ This provision may be read *a contrario* to interpret that exploitation rights in these contributions do belong to the publisher of the collective work. Yet, the same cannot be concluded for all other collective works; in fact, Article 52 of the TRLPI seems to establish a specific regime only for periodical publications.⁶⁰

In the Netherlands, when a work consists of separate works made by multiple persons, initial ownership of each separate work is in its original author. However, the person under '*whose guidance and supervision*' the '*work as a whole*' has been created shall be deemed to be the author of that whole work, or – in the case of no guidance and supervision – the compiler of the separate works is deemed to be the author of the whole work.⁶¹ The status of works of *joint authorship* is generally decided on the basis of Article 6 of the Aw. Accordingly, joint authorship requires that collaboration between authors is of such nature that their contributions are separable from the work as a whole and that these contributions cannot be subject to individual assessment outside the context of the whole work.⁶² There is a *combination of works*, when the contributions from different authors are separable. Dutch copyright legislation also contemplates *works made under supervision*. According to Article 6 Aw,⁶³ the person carrying out the physical activities is to be regarded as a mere instrument to the supervising giving directions as to how to perform the activities. In practice however, this provision has had limited impact.

In Poland, Article 11 of the PrAut, applicable to collective works (according to which rights in a collective work, especially an encyclopaedia or a periodical, are vested originally in the producer or publisher) explicitly states that '*rights to individual autonomous parts of the work belong to their authors*'. In other words, the publisher originally acquires only rights pertaining to the collective works as such but not rights in the '*contributions*' themselves. These have to be acquired separately and the original owner is the author.

In Italy, in case of a collective work, as regulated in Article 3 of the LdA, the person who organises and directs the creation shall be deemed its author (Article 7 of the LdA), independently and without prejudice of the copyright on the works or part of the works that make it up. Therefore, moral and economic rights on the collective work belong directly to its organiser and director; the moral and economic rights on the single works belong to the respective authors.

The author, however, cannot be a legal entity. The latter can only exercise the economic rights (not the moral ones) if so licensed or transferred by the author in case of a commissioned work or in case of a work created by the employee.

The author of a work exploited in a collective work, exception of a contrary agreement, has the right to have her name mentioned. The author does not have the right to be mentioned if the collective work is a magazine or a newspaper.

⁵⁸ Furthermore, unless otherwise agreed, the author may use her contribution if it has not been reproduced within a period of one month following its submission (in the case of daily publications), or within a period of six months (in the case of other publications).

⁵⁹ However, see TS (Civil chamber) May 13, 2002 [Job ads section] Westlaw.ES RJ2002/6744, granting the publisher of the newspaper the right to authorise independent exploitation of the information contained in its job ads section.

⁶⁰ That said, what remains unquestionable is that any rights of independent exploitation of contributions by new means unknown at the time when the collective work was created will clearly remain with their authors. This directly follows from Article 43(5) of the TRLPI: transfers will never cover unknown means of exploitation.

⁶¹ Article 5(1) DCA.

⁶² Hoge Raad 25 March 1949, NJ 1959, 643 (*La Belle et la Bête*).

⁶³ Tekst & Commentaar IE on Article 6.

The newspaper's director has the right to modify the article, unless agreement to the contrary, if it is so required by the nature or the purpose of the newspaper. The changes may be required by the need to harmonise the individual contributions with the unitary character of the collective work.

The author of the article or another work that has been reproduced in a collective work has the right to reproduce it in separate extracts or collected in a volume, but she has to indicate the collective work from which the single work is taken and the date of publication (art. 42 LDA).

In the UK, in the case of collective or composite works, such as encyclopaedias, there will be distinct copyrights, namely, the copyright in the entire work and the copyright in the various separate contributions. The person who gathers together and arranges the entire work will be the author of the whole work, considered as a compilation. As to the separate contributions, the authors of these will be the persons who wrote them.

Other countries, such as Germany and Hungary, do not allow legal entities to obtain copyright protection *ab initio*. In Germany, for example, it follows that initial owners can only be natural persons, never corporate entities – these can only acquire derived exploitation rights.⁶⁴ In Hungary, the copyright owner of a collective work shall be the *natural* person who edits/collects. Of course, this shall be without prejudice to the independent rights of the authors of the individual works and of the right-holders in subject matter covered by related rights included in the collection. (Article 7 (2)) This rule contemplates no exceptions.

According to Article 7(2) of the Danish Copyright Act, '*if a work is published without the author being indicated in accordance with subsection (1), the editor, if named, and otherwise the publisher, shall act on behalf of the author until the latter is named in a new edition of the work*'. This would suggest that a legal entity would not as a rule be designated as the initial owner of rights on a work.

2.1.2 The bundle of rights

The law grants exclusive rights to authors and that allow their owners to authorise or prohibit particular uses with respect to the works to which they pertain. Exclusive rights can usually be transferred, assigned, licensed or otherwise alienated in favour of a third party. Sometimes the law, instead of exclusive rights, confers on authors a right to receive remuneration for the use of works by a third party. In such circumstances, the use can take place without the prior authorisation of the author, provided that remuneration for the use is paid. These so-called remuneration rights are usually not transferable or assignable, but depending on the wording of the law, they can be waived. Finally, authors also enjoy so-called morals rights that reflect the close creative relation between him or her and the work. The author's bundle of rights will be described in the pages below.

Exclusive Rights

All ten Member States considered in this study grant authors of books, scientific articles, journalists, translators, illustrators, photographers and designers an exclusive, transferable right of reproduction, a right of communication to the public, including the right of making available, and a distribution right in conformity with the InfoSoc Directive (Directive 2001/29/EC). Some differences can be observed in the national implementation of the EU *acquis*, particularly with respect to the existence or the exercise of the rights conferred on authors under the Rental and Lending Rights Directive (Directive 2006/115/EC), and the Satellite and Cable Directive (Directive 1993/83/EEC).⁶⁵

⁶⁴ Schack, *Urheber- und Urhebervertragsrecht*, 4th edn., Tübingen 2007, p. 148.

⁶⁵ The EU Directives we refer to are (i) Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ('*InfoSoc Directive*'), Directive 2006/116/EC

Pursuant to the InfoSoc Directive, authors enjoy the exclusive, transferable, rights of reproduction (Article 2a), of communication to the public by wire and wireless means, including the making available to the public of their works (Article 3.1) and of distribution (Article 4.1).

The *right of reproduction* is very broad and encompasses the right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.

The right of distribution is 'the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise'.

The *right of communication to the public* by wire or wireless means, including broadcasting, should be understood in a broad sense covering any transmission or retransmission of a work to a public not present at the place where the communication originates. This is without prejudice to the right to authorise or prohibit cable retransmission, which is described further below.

The right of making available to the public, a separate right within the broader communication to the public right, is defined as '*the right to authorise or prohibit the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them*'. This exclusive right encompasses all forms of interactive Internet distribution, including downloads, streaming etc.

On the basis of the Rental and Lending Rights Directive, the rental right belongs to authors on an exclusive basis.⁶⁶ Article 2.1(a) of the Directive defines 'rental' as meaning '*making available for use, for a limited period of time and for direct or indirect economic or commercial advantage*.' Some Member States restrict the rental right to works fixed on video or audio format (Germany). In the case of film productions, Member States may provide that where authors, individually or collectively, conclude a contract, they shall be presumed to have transferred their rental right to their producer, subject to contractual clauses to the contrary (Article 3(5)). In such a case, authors retain an unwaivable right of remuneration for the rental of an audiovisual work (Article 5). In other words, the right of remuneration for the rental applies only in instances where the authors' right to make their work available to the public through rental has been transferred to a producer. In practice the rental right is commercially significant primarily with respect to audiovisual works, less so for the types of works covered by the present study. This right is only relevant for journalists and translators active in the audiovisual sector.

On the basis of the same Directive, Member States can choose to implement the *public lending right* as an exclusive right or as a right of remuneration (Article 6).⁶⁷ Lending is defined as '*making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public*'. This right is particularly relevant for the authors considered in this study.

Article 9(1) of the Satellite and Cable Directive confers authors the right to grant or refuse authorisation to a cable operator for a *cable retransmission* may be exercised only through a

of on the term of protection of copyright and certain related rights ('*Term Directive*'), Directive 2006/115/EC on the rental right and lending right ('*Rental and Lending Rights Directive*') and Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ('*CabSat Directive*').

⁶⁶ Directive 2006/115/EC on the rental right and lending right ('*Rental and Lending Rights Directive*'), art. 3.

⁶⁷ Article 6 states that '(...) Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending (...) 2. Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, remuneration. 3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2. Or be waived by authors or performers'.

CRMO. In article 1(3) of the Directive, '*cable retransmission*' is defined as the '*simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public*'. Under the terms of this Directive, cable retransmission implies the '*re-transmission*' of signals of programmes that have been initially broadcast by another organisation. Cable retransmission organisations '*capture*' the broadcast signals in order to reach their own, separate audience, different from the '*primary*' communication, which must be intended for reception by the public and can occur either over the air or by wire. The cable retransmission therefore qualifies as an act of '*secondary*' communication to the public and is thus regulated as a separate right.⁶⁸

Generally, the Copyright Acts of all Member States describe the acts that fall under the scope of the author's exploitation right. The terminology sometimes differs, but the concepts deriving from the European *acquis* must be interpreted uniformly, in the light of the rapidly augmenting case law of the CJEU.⁶⁹

National implementation of the rights

In France, Article L.122-1 CPI provides as its basic rule that '*the right of exploitation belonging to the author shall comprise the right of performance and the right of reproduction*'. The rental right has not been expressly implemented in France, on the ground that the rental right foreseen in the Directive is covered by the doctrine of *droit de destination*. This doctrine states that authors have the power to prohibit any contracting party or subsequent acquirer of the work one or more specific forms of use of copies of the work. This includes the possibility to determine not only the forms of commercial exploitation, but also to restrict certain uses made by subsequent acquirers or holders.⁷⁰ This right is, in fact, broader than the distribution right, but it does not implement the remuneration modalities provided for the rental right in the Directive. In France, a distribution right and its corollary, the exhaustion of rights, have been implemented into French copyright in Article L.122-3-1 CPI. The remuneration ensuing from the public lending right is limited to the authors of books who have entered into genuine publishing agreements for the exploitation of their books. The right is not assignable. The publishers also receive a share of the remuneration distributed.

In Germany, pursuant to Section 17(1) of the UrhG, the right of distribution is the right to offer the original or copies of the work to the public or to bring it to the market. The Section's paragraph (2) defines the principle of exhaustion. Furthermore, the right only applies to physical copies of a work. As for the act of distribution, Section 17 UrhG encompasses both the offering of the work to the public and bringing it to the market.⁷¹ In accordance with EU law, the distribution must be aimed at a change of ownership.⁷² The UrhG specifies both the remuneration provisions of those that are exclusive rights *in origin* as well as that related to a series of statutory compensation arising from limitations on copyright. In the first category, Section 27 describes the rental right and its non-waivability. The same goes for the

⁶⁸ P. B. Hugenholtz, '*SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive*', European Audiovisual Observatory (2009), Issue 2009-8 of the series IRIS plus, entitled '*Convergence, Copyrights and Transfrontier Television*', p12.

⁶⁹ On the concept of communication to the public, see for example: CJEU 14 July 2005, Case C-192/04, *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*, Reports of Cases 2005 I-07199 (*Lagardère*); CJEU 7 December 2006, Case C-306/05, (*SGAE v Rafael Hoteles*); CJEU 15 March 2012, Case C-162/10 (*Phonographic Performance (Ireland)*); CJEU 4 October 2011, Case C-403/08 (*FA Premier League v QC Leisure and Case C-429/08 Karen Murphy v Media Protection Services Limited*); CJEU 13 October 2011, Cases C-431/09 and C-432-09 (*Airfield/AGICOA*); CJEU 15 March 2012, Case C-135/10 (*Società Consortile Fonografici (SCF)/Del Corso*).

⁷⁰ A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *Traité de la propriété littéraire et artistique*, Paris, LexisNexis, 2012, para 265.

⁷¹ BGH GRUR 1991, 316, 317 (*Einzelangebot*).

⁷² Fromm/Nordemann, *Urheberrecht*, § 17 UrhG, at 19.

remuneration right for public lending despite lack of an express provision in the law. Remuneration for rental rights follows from Section 27(1) in conjunction with Section 17 UrhG, if the work is a video or audio recording. The remuneration is considered adequate if calculation is based on the economic value of the exploitation.⁷³ The remuneration right can be exercised only by a CMO. Sections 27(2), 17(2) Copyright Act govern remuneration for public lending. Public lending is defined as the time-limited transfer of a copy by a public lending authority to a user, which neither directly nor indirectly serves profit-making purposes.

In Hungary, the right of distribution, as per Article 23(I-3), covers the rental and lending. In case of literary works and sheets music the authors are entitled to a remuneration right. The remuneration is paid by the government, who also determines the amount. Our correspondent notes that the remuneration is not perceived by the interested parties as being sufficient. Similarly, according to the rules of public lending right the authors of literary works as well as authors of musical works printed in sheet music distributed by lending by libraries conducting public lending activity shall have a right to fair remuneration with regard to the lending. The collecting society shall determine the remuneration in its tariff to be established annually within the limits of the amount set forth in a separate line of the budgetary chapter supervised by the Minister responsible for culture. The authors may exercise their right to remuneration only through collective management of rights. They may waive their remuneration with an effect following the date of the distribution only and to the extent of the amount due to them.

In Italy, the distribution right is described and regulated in Article 17 of the LdA. According to Italian established doctrine, the preparatory acts to the marketing, such as the offer, its exposure for sale or its advertising, are reserved to the author also (*see reference below to the Knoll decision*). The sales made by a non-professional or implying transfer for non-commercial purposes of copies of a work, are excluded from the distribution right. Further, the LdA consider the exclusive right to rent and lend, as per Article 18bis of the LdA as separate modes of use with respect the distribution right (Article of the 17 LdA).

In the Netherlands, Article 12 of the Aw grants two exclusive rights to authors: the right to make reproductions of the work and the right to communicate the work to the public, which includes both material (e.g. distribution) and immaterial communication. Article 15c of the Aw provides that the lending of a copy of a (part of a) work, or a reproduction thereof, is not considered copyright infringement, provided that a fair remuneration is paid. It is an exception to the material '*communication to the public*' right in the Aw, which covers the lending of works. Educational and research institutions, libraries affiliated to such institutions, and the *Royal Library* are exempted from any remuneration payments. The author may waive her right to remuneration by notifying the collecting organisation. *Stichting Leenrecht* is responsible for the collection of the remuneration. On January 20, 2015, the *Dutch Court of Appeal (Hof Amsterdam)* rendered a preliminary ruling in which it considered whether the exhaustion doctrine applies to e-books. Without giving a final judgment, the court indicated that it considers it quite likely that exhaustion of rights, as described in Article 4(2) of the InfoSoc Directive, also applies to intangible goods, such as e-books.⁷⁴

In Poland, as our correspondent explains, copyright law is based on the idea that copyright gives to the right-holder the monopoly to use the copyright work in any way. In that sense, our correspondent stresses the fact that Polish copyright law is not built on the three pillars of distribution, reproduction and communication (to the public), but instead covers all uses of copyright works, subject, of course, to a series of exceptions. The PrAut thus, does not define the '*right of distribution*'. In Article 50, the provision containing a non-exhaustive list of fields of exploitation, distribution appears as a mere header, as a term used to introduce the fields of exploitation involving uses of physical copies of works other than communicating the work to

⁷³ EuGH GRUR 2011, 913, 914.

⁷⁴ Court of Appeal of Amsterdam, decision of January 20, 2015, ECLI:NL:GHAMS:2015:66 (*Vereniging Nederlandse Uitgeversverbond & Groep Algemene Uitgevers vs. Tom Kabinet*).

the public or reproduction. However, given that Polish law requires, as we will explain later on, contractual specification of the modes of exploitation covered in a particular transfer, Polish doctrine would generally interpret that specified uses such as the sale of copies, the rental of copies or the lending of copies to the public would fall under the loosely described right of distribution. In that sense, our correspondent also argues that a contract assigning or licensing just the '*right of distribution*' would be either outright invalid or would require interpretation according to the rules of Polish civil law of what actual uses were the intention of the parties.

As a result, in Poland, distribution as a concept is 'shorthand' for a set of modes of exploitation, the defining feature of which is that they require some transfer or other use of a physical copy of a copyright work. In that sense, rental is one of the modes of exploitation, which may theoretically apply to any kind of copyright works. Practically, the most popular application used to be DVD rentals though its importance is very minor these days. It is also worth noting that the public lending right has just been implemented in Poland by a law that came into force in late 2015.⁷⁵ The public lending rights will apply to copyright works '*expressed in words*', created or published in Polish in printed form. The new law ties the right to lending copies of such works by public libraries as defined in the law on libraries of 1997. The beneficiaries are: the author, co-author, whose contribution is a visual or photographic work, translator and publisher. The remuneration will be paid out by the designated collecting society.

In Spain, Article 19(1) of the TRLPI expressly includes rental and lending as forms of distribution.⁷⁶ As opposed to other Member States there is also an express reference to 'tangible support'. In line with the CJEU's *Knoll* decision,⁷⁷ what is essential in the Spanish construction is that the work or its copies are made available to the public; it is not necessary that they are effectively sold, rented, loaned, etc. Rental means the making available of the originals and copies of a work in order to use them for a limited time and for direct or indirect economic or commercial benefit (Article 19(3) of the TRLPI). Lending means the making available of the originals and copies of a work to be used for a limited time for neither direct nor indirect economic or commercial benefit⁷⁸ through establishments accessible to the public. (Article 19(4) TRLPI) The right of distribution, in its public lending form, is subject to an important limitation (Article 37(2) TRLPI).

In the UK, Section 16 of the UK CDA describes the exclusive rights as '*the acts restricted by the copyright in a work*'. It includes the act of copying the work and distinguishes public performance from public communication. Both would fall within the communication to the public right and the latter public communication would include, as a particular category, the act of making available (thus, in line with the *InfoSoc Directive*). UK legislation distinguishes in its Section 16 between the exclusive right to *issue* of copies of the work to the public (see

⁷⁵ The law that implements the public lending right in Poland is the Act of September 11, 2015 amending the act on copyright and related rights and the act on gambling (Journal of Laws 2015, item 1639). It entered into force on November 20, 2015. The original Polish title is: *Ustawa z dnia 11 września 2015 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz ustawy o grach hazardowych (Dz.U. 2015, p. 1639)*. The relevant provisions are art. 1 p. 10 and art. 1 p. 18 of the 2015 Act. These provisions amend Article 28 of the PrAut and add new provisions Article 35[1] to Article 35[4] to the Act.

⁷⁶ '*distribution means the making available to the public of the original or of copies of the work in a tangible support, by means of sale, rental, lending or in any other manner.*'

⁷⁷ C-516/13 (*Labianca*), decision of 13 May 2015 of the decision of the CJEU (*Dimensione Direct Sales and Michele Labianca v Knoll International*) where the Court ruled that a holder of an exclusive right to distribute a protected work may prevent an offer for sale or a targeted advertisement of the original or a copy of that work, even if it is not established that that advertisement gave rise to the purchase of the protected work by an EU buyer, in so far as that that advertisement invites consumers of the Member State in which that work is protected by copyright to purchase it.

⁷⁸ It shall be understood that there is no direct or indirect economic or commercial benefit when the lending is carried out by an establishment accessible to the public and gives rise to the payment of a charge which does not exceed what is necessary to cover its operating costs.

Section 18), from the exclusive right of and renting or lending the work to the public (see Section 18A). Section 18 of the CDPA confers on an owner of copyright a comprehensive right to control the rental and lending of copies of the copyright work and a right to receive equitable remuneration for such rental where the rental right concerning a sound recording or film has been transferred to the producer of the sound recording or film. The authors in question are the authors of literary, dramatic, musical and artistic works, and the principal directors of films. Remuneration rights, such as the equitable remuneration right and public lending right are exercised collectively on a statutory and voluntary basis respectively.

In Ireland, on the other hand, only three broad categories of exclusive rights exist, the distribution right is part of the making available right (in the Irish context). In Ireland, as opposed to the UK, the Act does not refer to communication (of the work) to the public as a general description of acts of publication. Confusingly, the phrase used for the general description is '*making available to the public*'. The interactive on-demand right, which is described in European instruments as the '*making available*' right, is a part of the Irish right of making available to the public. Indeed, the Irish Act only provides three broad categories of exclusive rights: *reproduction* (Section 39), *making available to the public* (Section 40) and *adaptation* (Section 43). Indeed, Section 40 of the CRRRA includes under the making available *the act of 'issuing copies of a work to the public (...)*'. Section 41 further clarifies the scope of the distribution right and explains that references to '*circulation*', used to describe the rights, '*shall include sale, rental or loan*'. The scope is not limited to acts that fall outside some other form of communication to public, and there will frequently be overlap.

Public lending was introduced in Ireland by the *Copyright and Related Rights (Amendment) Act 2007*. It is a scheme for writers, translators, authors, editors, illustrators and photographers who are named on the title page of a book or entitled to a royalty payment from a publisher, and who are citizens of, or domiciled or ordinarily resident in the EEA. Those parties, after registration with the scheme, are entitled to a share in a fund made available on an annual basis from the central exchequer to remunerate them for lending of the books by public libraries.

Finally, until the decision of the CJEU in the *Knoll* case⁷⁹ the universal view had been that Polish law must be compatible with EU law, because anything EU law wanted to protect by copyright under the umbrella of the distribution right was always protected in Poland. Offering, however, did not seem to be an act of using a copyright work, but rather an action preceding actual use (one may refer to patent law in this regard, where offering 'made its way' to a direct patent infringement, whereby 'materially' remaining an inducement to infringe). Moreover the expected decision of the CJEU in the *Vereniging van Openbare Bibliotheken*⁸⁰ case will undeniably prove influential to define the contours of the distribution right and the public lending right. It should indeed be clarified whether the public lending right as conferred on authors pursuant to the Rental and Lending Directive also applies to e-books (as opposed to the prevalent doctrine of Member States such as Germany).

⁷⁹ C-516/13 (*Labianca*), decision of 13 May 2015 of the decision of the CJEU (*Dimensione Direct Sales and Michele Labianca v Knoll International*) where the Court ruled that a holder of an exclusive right to distribute a protected work may prevent an offer for sale or a targeted advertisement of the original or a copy of that work, even if it is not established that that advertisement gave rise to the purchase of the protected work by an EU buyer, in so far as that that advertisement invites consumers of the Member State in which that work is protected by copyright to purchase it.

⁸⁰ C-174/15 request for preliminary ruling where the Court is asked to decide whether 'Articles 1(1), 2(1)(b) and 6(1) of Directive 2006/115¹ are to be construed as meaning that 'lending' as referred to in those provisions also means making copyright-protected novels, collections of short stories, biographies, travelogues, children's books and youth literature available for use, not for direct or indirect economic or commercial advantage, via a publicly accessible establishment' through download.

Remuneration rights / Compensation

The *InfoSoc Directive* foresees the possibility to pay 'fair compensation' to the rights holder for certain of the uses covered by the limitations of Article 5. As finally adopted, the Directive provides for a right to 'fair compensation' in three instances: for reprographic reproduction (Article 5(2)(a)), for private copying (Article 5(2)(b)), and for reproduction of broadcast programs by social institutions (Article 5(2)(e)). Apart from these three limitations, Recital 36 states that the Member States *may* provide for fair compensation for rights holders also when applying the optional provisions on exceptions or limitations, which do not require such compensation. According to Recital 35, the level of 'fair compensation' can be related to the possible harm to the rights holders resulting from the act in question. In cases where rights holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. By introducing the notion of 'fair compensation' the framers of the Directive have attempted to bridge the gap between those (continental European) Member States having a levy system that provides for 'equitable remuneration', and those (such as the United Kingdom and Ireland) that have so far resisted levies altogether.⁸¹

In the Netherlands, compensation for the reprography exception of Article 16h is collected by *Stichting Reprorecht*.⁸² The right to fair compensation for reprographies is waivable.⁸³ Organisations are not obliged to pay the remuneration fee to *Reprorecht* when they can show that they have made an agreement with the rightholder to pay the remuneration directly to him.⁸⁴

Regarding private copying (Article 16c), for which compensation is collected by *Stichting de Thuiskopie*, it is not clear from the law whether the right to fair compensation is waivable. However, Article 16c DCA reflects the provision of Article 5(2)(b) InfoSoc on which the CJEU decided that the author's authorisation of private copies does not affect the right to 'fair compensation'.⁸⁵ Such an authorisation is 'devoid of legal effects' when a Member State has implemented such an exception in its legislation.⁸⁶ This suggests that the right to remuneration of Article 16c DCA is not waivable. The lending right, as per Article 15c DCA, is waivable.⁸⁷

In Italy, the law expressly declares that certain compensation rights are not waivable, for example: the rental and lending rights (art. 18, 5 LDA). In the cases of private copying, reprography and educational use, the law does not declare the non-waivability of those compensation rights, therefore the issue is still under discussion even if there is some case law declaring waivability null and void, at EU, but also at domestic level.⁸⁸

In France, Article L.122-10 paragraph 2 of the CPI operates an automatic assignment of the rights of reprography to the *Centre Français de la Copie* ('CFC'), the French CRMO entrusted with the administration of this right. The automatic transfer applies to all protected works whatever the date of their publication. This automatic assignment only concerns traditional paper photocopying, defined by Article L.122-10 paragraph 2 of the CPI as 'reproduction in the form of a copy on paper or an assimilated medium by means of a photographic process or one having equivalent effect permitting direct reading'. Digital reproductions are therefore excluded from the automatic assignment.

⁸¹ Bechtold in Dreier/Hugenholtz 2006, p. 373.

⁸² Article 16l(1) DCA together with Article 1. Besluit van de Minister van Justitie van 8 januari 2003, nr. 5202196/02/6, tot aanwijzing van de Stichting Reprorecht als rechtspersoon belast met inning en verdeling van de vergoedingen voor reprografisch verveelvoudigen (Staatscourant 2003, 8, p. 11).

⁸³ Article 16k DCA.

⁸⁴ Article 16l(5) DCA.

⁸⁵ CJEU 27 June 2013, joined cases C-457/11 to C-460/11 (*VG Wort*): § 37.

⁸⁶ *Ibid.*

⁸⁷ Article 15c(4) DCA; Lingen 2007, p. 145.

⁸⁸ By way of example, in a recent judgement by the Court of Milan, dated January, 3rd, 2014 (R.G. 45279/2012), the Judge recognised that the compensation for private copy is non-waivable.

With respect to the remuneration for *private copying*, beneficiaries include in France the authors of works fixed on any other medium (e.g. books), where the works are copied on a digital medium. The wording of the CPI seems to mean that the right to compensation is not assignable or waivable. In any event, in practice, this right is not assigned or waived.

It is not always clear in the national legislation whether the rights to compensation flowing from the exceptions and limitations are waivable or not. In this context, the CJEU ruling in the *Luksan* case should be highlighted. The Court ruled that, despite the presumption of transfer of rights from the author of a film to the producer, the right to fair compensation arising from the private copying exception implemented by the *InfoSoc Directive* should not be waivable under domestic legislation.⁸⁹ In case of doubt when assessing the waivable character of claim to fair compensation arising from an exception recognised under the European *acquis*, we believe that national courts would need to consider the CJEU's reasoning in the *Luksan* case.

In Germany, the compensation that follows from statutory limitations of copyright may not be waived by the author in advance, according to Section 63 of the UrhG. They may be assigned in advance only to a collecting society, or together with the grant of the right of publication to the publisher, provided that the publisher lets them be managed by a collecting society which manages publishers' and authors' rights jointly.

Concerning this statutory compensation arising from exceptions and limitations, lacking a contractual agreement, the party that exploits the work is generally responsible for paying the author equitably. In the case of Section 54, the manufacturer of the respective devices or storage media is responsible for payment. Another interesting topic worth mentioning is the legal nature of press reviews (or press clippings) and its different implementation in the Member States. This different implementation is triggered by Article 5(3)(c) of the *InfoSoc Directive*, which allows Member States to adopt an exception for the reproduction and communication to the public of articles published by the press and the reporting of current events. As Guibault explains, Member States may, on the basis of Article 5(3)(c), '*provide for a limitation allowing reproduction of articles from newspapers and periodicals to take place under certain conditions without the prior authorisation of the rights owner*' and regardless of the medium.⁹⁰ In some jurisdictions, these press reviews are not even expressly contemplated in the legislation (such as France, for example, where the interpretation of the exception is thus, very narrow), others do (such as Germany or Spain). In Germany and Spain, the press review works as an exception with compensation.

In the Netherlands, as Guibault explains, Article 15 of the DCA, dealing with news reports, received, '*for a long time, a very broad interpretation for the courts*', encouraged by the legislator expressly noting that newspaper-clipping services fell within the scope of the exception. This interpretation was reinforced by the interpretation applied by the Dutch Supreme Court in the landmark *Knipselkranten* decision⁹¹. As Guibault continues, '*a narrow interpretation of the news report exception in principle restricts the possibility to reproduce newspaper articles and broadcast commentaries only by press or broadcasting entities of the same nature, provided that the copyright is not explicitly reserved. By contrast, a broad interpretation of this limitation extends the privilege to institutions and enterprises that offer second hand information on selected topics to their subscribers or employees in the form of*

⁸⁹ See: C-277/10, Decision of the Court of Justice of the European Union, 9 February 2012 (Martin Luksan v Petrus van der Let).

⁹¹ Court of Appeal of Leeuwarden, 26 July 2011, LJN: BR3119 (*NDP v. Provincie Flevoland*), AMI 2011-6, p. 232-235; District Court of Amsterdam, 4 September 2002 (*Uitgevers en Freelancers v. Knipselkranten*) AMI 2003-1, p. 22; District Court of Rotterdam, 22 August 2000 (*Kranten.com*), *Informatierecht/AMI* 2000/10, p. 205.

collections of newspaper clippings, provided that the copyright is not explicitly reserved.⁹² However, the new line of judicial interpretation actually brings the Dutch press exception closer to that of France, Germany or the UK where *'newspaper clipping services are subject to either a voluntary or a statutory licensing system, for which equitable remuneration must be paid to the rightholders'*.⁹³

Finally, in the context of remuneration rights, we should mention the *Reprobel* decision of November 2015 by the CJEU given its relevance to the future assessment of compensation under exceptions and limitations.⁹⁴ This reference for a preliminary ruling from the *Cour d'Appel de Bruxelles* (Court of Appeal, Brussels, Belgium) declared that *'fair compensation'* under Article 5(2)(a) and (b) of the InfoSoc Directive should be interpreted differently *'according to whether the reproduction on paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects is carried out by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial'* (paragraph 1 of the ruling). Further, as per paragraph 2, it interprets that *'Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived'*. Also, relevant for this study, the CJEU considered that a remuneration consisting of a combination of an *ex ante* lump sum and a proportional amount was not a priori incompatible with Article 5(2)(a) and (b).⁹⁵

In practice, however, compensation arising from exceptions is generally not perceived as a significant source of income for authors⁹⁶ and is often not even contemplated or negotiated in the contracts between authors and publishers. As such, it is presumed to remain with the author (even more so after the *Luksan* decision).

Moral rights

Moral rights, in particular those revolving around paternity and integrity are granted to authors in all the Member States under study. These rights are everywhere non-transferable, but can be waived in some Member States (UK and Ireland). In most of continental Europe, moral rights however cannot be waived (e.g. Spain, Germany, France, Italy, Poland, Hungary). Article 3(3) of the Danish Copyright Act provides that the moral rights of the author cannot be waived except in respect of a use of the work which is limited in nature and extent.⁹⁷

The Netherlands, for example, after enumerating the different moral rights in Article 25 of the Aw, specifies that the right *'to oppose any communication to the public of her work without*

⁹² L. Guibault, *'The Press Exception in the Dutch Copyright Act'*, in: *A Century of Dutch Copyright Law. Auteurswet 1912-2012*, P.B. Hugenholtz, A.A. Quaevliet & D.J.G. Visser (eds.), Amsterdam: deLex 2012, p. 462.

⁹³ *Id.*, p. 475.

⁹⁴ Case C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, intervener Epon Europe BV.

⁹⁵ Though not covered in this legal analysis we need to point out that, further to the *Reprobel* decision and the prior judicial review of private copy exception without a levy in the UK of July 2015, whereby the lack of compensation requirement had not been proved to justify the lack of levy, the UK is expected to quash the private copy exception that had only been introduced in October 2014.

⁹⁶ In Poland, for example, our correspondent explains that, in 2012, proceeds collected as blank media levies (for private copy) amounted to approx. Euro 2m, which for a country the size of Poland our correspondent considers insignificant.

⁹⁷ Our Polish correspondent notes the particular nature of *'ghostwriting'* as regards, amongst others, moral rights. It is allowed to contractually undertake not to exercise one's moral rights in specific circumstances (e.g. *ghostwriting*) but this should not lead to the circumvention of the law and the limits are controversial: e.g. the borderline between a legally admissible contractual regulation of the exercise of moral rights and the prohibited waiver.

being named as the author” can be waived by the author. The right ‘to oppose any communication to the public of his work under a different name than his’ and to generally oppose to any modification are waivable where they concern alterations in the work or its title. However, the right to oppose distortion is not waivable.

The moral rights conferred in the UK and Ireland are similar. They include the following:

- the paternity right, which is the right of an author of a literary, dramatic, musical or artistic work, or director of a film, to be identified as author or director respectively;
- the integrity right, which is the right of an author of such a work not to have it subjected to derogatory treatment;
- the right of any person not to have a work falsely attributed to him as author; and
- the privacy right, which is the right of any person to privacy in respect of photographs which she commissioned for private and domestic purposes.

All these moral rights are personal in nature. They cannot be assigned, but they can be waived. They are not infringed if there has been consent to the act in question. Special provision is made as to the exercise of the rights after the death of the person initially entitled to them. Under CDPA Section 94, moral rights, although not assignable, may be transmitted upon the death of the author (Section 95).

One important difference between the UK’s and Irish legal treatment of moral rights is that the paternity right does not need to be asserted in Ireland, one of the few respects in which Irish law is different to UK law.

Employment relationships and moral rights

We have seen in a previous section how the laws of the Netherlands, UK and Ireland respectively, allow legal entities to own copyright *ab initio*.

The situation of employed authors in the Netherlands is particular compared to employed authors in other Member States, because the presumption of initial ownership of the employer has been interpreted as also encompassing the moral rights on the work.⁹⁸ In that sense, Dutch law ‘effectively allocated moral rights in a legal person’. Surely, as Hugenholtz further explains, ‘such a rule would be hard to conceive in other author’s right jurisdictions’.⁹⁹

As we have seen, in the UK, CDPA Section 11(2) provides that in the absence of an agreement to the contrary, where a literary dramatic, musical, or artistic work or a film is made in the course of employment, the employer is the first owner of any copyright in the work.

While employees may retain moral rights in the works they create, these are subject to a number of limitations.¹⁰⁰ For example, CDPA Section 79(3) provides that the right to be identified as author does not apply to anything done by or with the authority of the copyright owner where copyright in the work originally vested in the author’s or director’s employer by virtue of Section 11(2) (works produced in the course of employment).¹⁰¹ Further the right of paternity needs to be asserted in writing to be able to enjoy protection. An example of the typical clause in author’s contracts regarding the assertion of moral rights, in this in a model contract for translators, would look as follows:

‘The Translator asserts his/her moral right to be identified as the Translator of the Work in relation to all such rights as are granted by the Translator to the Publishers under the terms and conditions of this Agreement. The Publishers undertake that the Translator’s name shall appear on the title page and jacket/cover of their edition of the Translation and in all appropriate publicity material (catalogues, advertisements, website etc.) concerning it, and

⁹⁸ J.H. Spoor, D.F.W. Verkade, and D.J. Visser, *Auteursrecht*, Deventer, Kluwer, 2005, p. 38.

⁹⁹ Hugenholtz.

¹⁰⁰ CDPA s.79(3) and s.82.

¹⁰¹ *Ibid.* p.123.

shall use their best endeavours to ensure that this undertaking is adhered to also in other editions of the Translation and that the name of the Translator is mentioned in connection with all reviews of and quotations from the Translation. The Publishers shall print the following copyright notice relating to the Translation on the reverse of the title page of the Translation: 'English language translation © [name of copyright holder (year of publication)]'.

In the UK, for instance, the moral rights granted in Chapter IV of the CDPA are not property rights and cannot be assigned. However, they can be waived.¹⁰² In addition, the Chapter provides multiples exceptions: authors of works destined to be published in newspapers, periodicals, encyclopaedia, among others do not have moral rights. Nonetheless, in order to avoid misunderstandings, (model) contracts in the UK often include a waiver of moral rights, such as the author's moral right of integrity or an agreement to waive it in the future, in order to be able to exploit the subsidiary rights (which give the publisher the right to sub-license exploitation by others).¹⁰³

Ireland follows the rules set out for the UK with the exception that moral rights need *not* to be asserted in order to be automatically enjoyed. In the context of an employment relationship in Ireland, a similar provision to that of the UK exists: where the paternity right is concerned, it is *not* enjoyed by the employee in relation to anything done in the course of employment which is done with the employee's authority or consent. This leaves the employer free to deal with the employee's works. Where the integrity right is concerned, it is not enjoyed by the employee unless: a) the employee is named as the author in the publication of the work or has previously been identified as the author of that work in a publication, or b) there has been a disclaimer by the employee (for example a general disclaimer in an employment contract).

Finally, it is worth noting the situation in Spain regarding moral rights in some specific copyright ownership scenarios. Indeed, a pending subject of Spanish case law is the allocation of moral rights in legal entities, who are first owners of all intellectual property rights, e.g., in collective works ex Article 8 of the TRLPI, as we have discussed earlier. Despite some decisions already favourable to granting moral rights to legal entities,¹⁰⁴ the issue remains unsettled.

2.1.3 General rules on transfer

Formalities for the transfer of copyright

General contract law provides that agreements are concluded at the moment the parties exchange consent to be bound by the terms of the contract. In all countries examined, general contract law provides that consent can be manifested in any form. Unless the law says otherwise, the parties to a contract are free to decide whether they wish to conclude a contract under oath, in writing, orally or even tacitly. However, in many instances, full transfers and exclusive licences are subject to the accomplishment of formalities. By contrast, the grant of a licence is a permission governed by general contract law, for which there is generally no described form (except for the exclusive licence, as already discussed).

¹⁰² Section 95 also provides for the transmission of moral rights upon the death of the author.

¹⁰³ Author's Publishing Agreement (Appendix B)The Author hereby asserts to the Publisher and to its licensees the Author's right of paternity in the Work as provided in the Copyright, Designs and Patents Act 1988 and accordingly it is agreed that the Author is entitled to have the Work published in the Author's name. The Author is entitled to object to any amendment or alteration to the Work which would breach the Author's right of integrity in the Work as provided in the Copyright, Designs and Patents Act 1988 but the Author agrees that amendments, alterations or additions made by the Publisher or a third party [...] will not infringe such right. The Author further hereby waives the Author's right of integrity when such a waiver is an essential condition of the exercise of any of the subsidiary rights.

¹⁰⁴ See AP Barcelona (Sec. 15) March 28, 2006 [Sagrada Familia] Westlaw.ES AC2006/1723, AP Barcelona (sec.15) May 28, 2003 [Lara Croft] Westlaw.ES AC2003/960, and AP Alicante (sec.5) October 2, 2000 [Telejurisprudencia] Westlaw.ES AC2000/1603.

In Denmark, rights can be transferred by means of either licences or assignments, there are no formal requirements. The only limitation is the narrow interpretation of the transfer: in case of doubt, transfers are considered to be non-exclusive (as per Article 53 of the Danish Copyright Act).¹⁰⁵

In many Member States, a full transfer of rights will need to be done in writing (Italy, Hungary, Netherlands, Poland and Spain). In France, copyright contracts regarding the assignment of rights, licence of rights or work commissioning should be concluded in writing.¹⁰⁶ Moreover, this is an evidentiary rule, which means that the author will be able to prove the existence of the agreement by any means, since the assignee will be considered to be a merchant under commercial law. In Ireland, copyright can be transferred by full or partial assignment in the same way as other personal or moveable property. However, an assignment must be in writing to be effective (a licence may be verbal).

In Germany formal requirements only exist in relation to agreements concerning future works (Section 40(1)) and future forms of exploitation (excluding open content, Section 31a(I)). It should also be noted that, in terms of strict terminology, as is the case in Spain, technically the right is neither assigned nor waived, but disposed. Either exclusively or non-exclusively.

Spanish TRLPI seems to imply that exploitation rights cannot be fully assigned¹⁰⁷ but merely 'licensed' in the sense of constituting a right in them.¹⁰⁸ Perhaps for this reason, the TRLPI carelessly refers to 'transfer', 'assignment' and 'licence' without any major significance. What does make a difference (in terms of sublicensing the rights and standing to sue against infringements) is the exclusive or nonexclusive character of the transfer. Despite that, in common practice, one may use 'licence' to refer to nonexclusive transfers (close to an authorisation), and 'assignment' to imply some degree of exclusivity.

The transfers of exploitation rights *inter vivos* (Article 43 TRLPI) may be effected by means of contract. According to the principle of independence of exploitation rights (Article 23 TRLPI), these rights can be transferred together or separately, on an exclusive basis or not. Transfers *inter vivos* are subject to specific rules and conditions intended to restrict their scope to what is strictly necessary to achieve the goal of the contract. Additional specific rules apply to publishing contracts¹⁰⁹ (Articles 58 to 73 TRLPI). According to Article 57 TRLPI, this special

¹⁰⁵ The *Danish Society of Authors (DFF)* has voiced concerns about the incompleteness of some contracts or transfers without the existence of written contracts. However, the DFF remains unsure that introducing formalities in the current regime of informality of contracts would prove beneficial as long as no proper collective bargaining right. In fact, the DFF feels that written contracts for the transfer of copyright might ultimately prove counterproductive and see contract standardisation by publishers.

¹⁰⁶ Assignments of audio-visual adaptation rights must also be in a written agreement, which has to be a contractual document that is separate from the agreement relating to publication itself (two separate contractual documents must be executed).

¹⁰⁷ Instead, under the old Law of 1879, the exploitation rights were fully assignable -although, as mentioned, it established a reversion mechanism to the authors' heirs after 25 years following the author's death, for the remaining term of protection of 55 years (Article 6 Law of 1879). According to Trans. Prov. #3 TRLPI, any assignment (sale) of exploitation rights under the previous regime will still be valid under the TRLPI (and fully effective in accordance with the Law of 1879) exception made for any clause that assigns exploitation rights in all works that the author may create in the future or by which the author undertakes to create no works in the future (these clauses will be null and void) and for the protection of moral rights (Trans. Prov. #6 TRLPI).

¹⁰⁸ See F. Rivero Hernández, 'Comentario Sec.2 Derechos de explotación,' *Comentarios a la Ley de Propiedad Intelectual* (R. Bercovitz coord.), Tecnos, 3rd edn. (2007), p.263. In a similar sense, see J.M. Rodríguez Tapia, *Comentarios a la Ley de Propiedad Intelectual*, Thomson - Civitas, 2007 p.150. However, there is contradictory case law on this topic. See, for instance, AP Asturias January 28, 1993 [Restaurante Salsipuedes] Westlaw.ES AC1993/82: accepting the transfer of exploitation rights in some photographs commissioned for advertising purposes as a full assignment of rights.

¹⁰⁹ By this contract, the author transfers to the publisher, in exchange for an economic compensation, the rights to reproduce and distribute her work, and the publisher undertakes to carry this out on her own account and at her own risk (Article 58 TRLPI). Publishing contracts will mostly apply to

contractual regime prevails over the general contract rules (Articles 42 to 56 TRLPI) which only subsidiarily apply to them. However, the interaction between these specific provisions and the general contract interpretation rules (mainly in Article 43 TRLPI, as to term, territory and means of exploitation) remains unsettled in some points.

According to Article 45 of the TRLPI, any transfer of exploitation rights shall be evidenced in writing.¹¹⁰ This does not mean that non-written licences are invalid. To the contrary, a combined reading of Article 45 and Article 8 (see *infra*) leads to the conclusion that written form is only required for exclusive licences, while non-exclusive licences may be granted (and valid) in any form (e.g., orally). In other words, while written form is a requirement *ad validitatem*¹¹¹ for exclusive licences, it is only *ad probationem*¹¹² for other licences.¹¹³ As an exception to the general rule, all publishing contracts must be entered in writing, whether or not they grant an exclusive licence (Article 61 TRLI).¹¹⁴ Any publishing contract that is not made in writing or that does not specify the maximum and minimum number of copies of each print run limits or the remuneration of the author will be null and void.

In the UK, all economic rights are transferable by assignment. Transfer can occur both by assignment and by licence (exclusive or non-exclusive). In general, contracts between authors and publishers are not subject to any formal requirements. A copyright contract may be written, oral or even implied. However, assignments and exclusive licences are not effective unless they are in writing and signed by or on behalf of the copyright owner.¹¹⁵ Since no other formality requirement is set under the law, any document, which is construed truly to transfer ownership, will be considered to be valid. Discovering the true intention of the parties will depend on an assessment of the context, and there is no need to use the words 'assign' or 'grant', although this could be indicative of the will of the parties. Even the wording on simple invoices or receipts has been considered as sufficient for establishing the intention of title transfer.

In Ireland, copyright can be transferred by full or partial assignment, by will and by operation of law in the same way as other personal or moveable property. An assignment must be in writing, signed by the assignor, to be effective. A licence may be verbal. In that sense, legislation is not unlike that of the UK.

Scope of the transfer of copyright

The general rules of contract law of most countries do not regulate the scope of transfer of rights, except for France where the Civil Code provides that perpetual transfers are considered null and void. Generally speaking, future forms of exploitation can be transferred under

literary works, but also to musical and audiovisual works, etc. This regime does not apply to future works, commissioned works or contributions to periodical publications. Specific obligations accrue on both the publisher (Article 64 TRLPI) and the author (Article 65 TRLPI).

¹¹⁰ The same applies to works created under employment. According to Article 51(1) TRLPI, the transfer of exploitation rights to the employer must be made in writing. Failing it, the presumption of transfer applies (Article 51(2) TRLPI). See *supra* § 1:30 [a].

¹¹¹ A formal requirement for the transfer to be valid and effective.

¹¹² A formal means to prove the existence of a contract. See also AP Madrid (sec.10) December 13th 2004 [Canciones y Recursos Musicales] Westlaw.ES JUR2005/47867: lack of written form in the commissioning of a work as part of a collective work does not invalidate the (implied) transfer of exploitation rights to the commissioning party.

¹¹³ On the validity of oral licences, see AP Madrid (sec.18) February 18, 2004 [Fundación Santa Maria Ediciones] Westlaw.ES JUR 2004/250162: for over a year, the author created and licensed over 1.400 illustrations commissioned by a publisher, based on an oral agreement; the contract was broken when the publisher required the author to sign a collective work contract in written form.

¹¹⁴ See TS (Civil chamber) May 31, 2005 [Figuracions] Westlaw.ES RJ2005/4252: declaring null and void an oral publishing agreement.

¹¹⁵ According to s. 92(1) CDPA, 'exclusive licence' is defined to be 'a licence in writing signed by or on behalf of the copyright owner authorising the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable exclusively by the copyright owner.'

general contract law provided they are sufficiently detailed in the agreement (Ireland, UK, Denmark, Netherlands).

Specification of scope of transfer

Under the copyright law of most EU Member States, the courts give a restrictive interpretation to clauses in copyright contracts that operate the transfer of rights from an author to an exploiter. The laws of Germany and the Netherlands give the courts the express instruction to interpret a grant of rights as encompassing only those rights that are required by the purpose pursued in the transfer at issue. For example, Article 2(2) of the Aw provides that the transfer of rights covers 'only those rights that are specified in the contract or necessarily derive from the nature or purpose of the title'. This '*purpose of grant*' rule is interpreted as to seek to protect the author against any transfer that she is not aware of. It is therefore supported that such a rule does not apply to contracts where the transferor is not the original (natural) author. This rule thus calls for a restrictive interpretation of contracts transferring copyrights, in particular contracts between natural authors and other parties specifying the rights that are transferred. On the basis of this provision, the courts generally consider that if the contract does not enumerate each right individually then any right that does not appear in the list is not covered by the transfer. However, this is not exempt of uncertainty. For example, according to Article 2(1) of the Aw, copyright is assignable 'in whole or in part'. This implies two things: i) a complete transfer of right(s) in a work is possible and ii) copyright consists of a bundle of rights which can be split up and transferred individually. While the phrase 'in whole' suggests that there is no limitation to the scope of transfer, it is more controversial than it appears to be; especially when it concerns rights of yet non-existing modes of exploitations.

Italy also follows the '*purpose of grant*' principle and the law clarifies that, in the absence of an agreement to the contrary, the transfer of one or more of the exploitation rights shall not imply the transfer of other rights which are not necessarily dependent on the right transferred, even if they are included in the same category of exclusive rights.

France and Spain establish stricter requirements than those of the three countries above. Other countries, such as Denmark, Hungary and Poland, also impose a limitation on the scope of transfer yet are often more lax as regards rules on the forms of payment.

In France, Article L.131-3 paragraph 1 of the CPI provides that the assignment of the author's rights is subject to each of the assigned rights being separately mentioned in the assignment agreement and the field of exploitation of the assigned rights being defined as to its scope and purpose, territory and duration. In Spain, Article 43 (I) of the TRLPI also limits transfers to what has been specifically mentioned in writing (in terms of rights, means of exploitation, tenor and scope). In other words, lack of specification leads to limitations of territory (to that where the transfer takes place),¹¹⁶ types of exploitation and works (only those expressly mentioned) and tenor (5 years).¹¹⁷ Regarding the latter, different terms may apply under the specific regimes:¹¹⁸ 10 years in publishing contracts where the author has been remunerated

¹¹⁶ Neither the nationality of the contracting parties, nor their place of residence is important, but only the place in which the agreement is concluded. The same is true for Article 51(2) TRLPI, relating to the presumption of transfer to the employer.

¹¹⁷ See AP Huesca (sec.1) May 25, 2004 [Bodega de Gratal] Westlaw.ES AC2004/871: the licence to use a painting for advertising purposes in a brochure was deemed to be granted for only five years (since nothing was stated in the contract).

¹¹⁸ See C. Gete-Alonso, 'Comentario al Artículo 43', Comentarios a la Ley de Propiedad Intelectual (R. Bercovitz coord.), Ed. Tecnos, 3d ed. (2007), p.784: the special terms in Article 69 prevail over the interpretative rule in Article 43(2) TRLPI. However, doctrine is divided on this issue; some scholars read the terms provided for in the special regimes only as a maximum term, but not as an interpretative rule applicable instead of Article 43(2) TRLPI; see P. de Pablo Contreras, Comentario al Artículo 69, Comentarios a la Ley de Propiedad Intelectual (R. Bercovitz coord.), Ed. Tecnos, 3d ed. (2007), p.1058: the default term in Article 43(2) TRLPI will always apply.

with a lump sum (Article 69(3) TRLPI),¹¹⁹ 15 years in all other publishing contracts (Article 69(4) TRLPI), and five years for musical performances (Article 75(1) TRLPI), respectively. Where the means of exploitation are not mentioned specifically and precisely, the transfer will be limited to the means of exploitation that necessarily derive from the contract and are essential to fulfil the purpose of the contract.¹²⁰

In addition, any publishing contract must provide for minimum contents (Article 62 of the TRLPI) as to: language/s, means and dates of distribution, remuneration and payments, maximum and minimum numbers of copies for each edition, and the remuneration to be paid to the author. In case of failure to provide for these last two conditions, the contract will be null and void.¹²¹ A book publishing contract must also specify the language or languages in which the work is to be published (Article 62 TRLPI).¹²²

It remains an unsettled issue whether the presumptions of transfers provided for audiovisual works and works created under employment (and specially, computer programs), are also limited by these interpretative provisions.

In Poland, Article 41 (2) of the PrAut only covers modes of use explicitly mentioned in the agreement. This rule is absolute in the sense that it takes precedence over any interpretation of the intention of the parties. As regards the tenor, indefinite licences or those above 5 years can be terminated at any time at the author's discretion.

In the UK, courts tend to construe implied terms of a licence narrowly, as covering only acts that are necessary to give business efficacy to the agreement.¹²³ One of the scope limitations that the law sets on the transfer of rights is found in CDPA Section 93B, according to which the equitable remuneration right further to the transfer of the rental right may not be assigned except to a collecting society. With regard to the duration of the transfer of rights, there is no express limit set by law. Copyright may be assigned for a period less than the whole term of copyright protection. This means that the transfer of rights may take place for a fixed term that could start immediately or even start in the future, or even for a period of time that is not

¹¹⁹ However, see AP Madrid (sec.19) May 23, 2006 [Grupo Anaya] Westlaw.ES JUR2006/184929: a non-written licence of rights on mere photographs to be used as illustrations of books and other publications, in exchange for a lump sum (as 'secondary' or accessory to the main exploitation, according to Article 46(2)(b) TRLPI) was not subject to the interpretative rule of Article 43(2) TRLPI but confirmed as a 'final' (for all the term of protection) licence of exploitation rights.

¹²⁰ See AP Madrid (sec.11) March 29, 2005 [Tribuna de Actualidad] Westlaw.ES AC2005/289: the use of a photograph in another issue of a magazine was not covered by the licence, which was an oral agreement, that authorised its first publication. See also AP Barcelona (sec.15), March 10, 2006 [La Vanguardia digital] Westlaw.ES JUR2008/63662: photographs included in the printed editions of the newspaper (collective work) in 2000 and 2001 can also be exploited in the digital format of the newspaper because at that time the newspaper was already published in both printed and digital formats; in other words, the court interpreted that both digital and printed means necessarily derived from the contract and were essential to fulfil its purpose, according to Article 43 TRLPI.

¹²¹ Instead, other 'omissions' may be supplied by other articles in the TRLPI (for instance, exclusivity will be decided according to Article 48, territorial scope according to Article 43(2), means of distribution according to Articles 43(2) and 48, etc) or each party may compel the other to supply for it.

¹²² Failure to specify the language or languages in which the work is to be published shall give the publisher the right to publish it only in its original language. Where the contract provides for publication of work in more than one official Spanish language (in addition to Spanish, Catalan, Basque, and Galician are also official languages within their respective communities), the publisher is obliged to publish it in all these languages. If, after five years since the author delivered the work to the publisher, he has not published it in all of the languages provided for in the contract, the author may terminate the contract in respect of the languages in which it is not yet published. This also applies to translations of foreign works into Spanish.

¹²³ In *Hospital for Sick Children v Walt Disney Productions*¹²³ it was held that a licence granted at the times of silent films to use a literary work for the cinema does not authorise its use for sound films. *Ray v Classic FM plc* [1998] F.S.R. 622; *Barrett v Universal-Island Records Ltd* [2006] EWHC 1009 (Ch).

predetermined or known at the date on which the transfer takes place. However, it is accepted that the legal title will revert to the assignor at the end of this period.

Transfer of copyright can occur both by *assignment* and by *licence* (exclusive or non-exclusive). Copyright law takes a liberal view as to what may be assigned. In particular, it allows partial assignments by reference to '*times, territories and classes of conduct*' (*Kervan Trading v. Aktas [1987]*). For example, an agreement to write a book might include an exclusive grant of all rights. In turn, the publisher might divide the exploitation of the work by way of hardback, paperback, reprography, electronic distribution, translation, film, etc. The copyright owner can also permit certain activities with regard to a copyright work by granting licences to particular individuals. In particular, an exclusive licence is an agreement according to which a copyright owner permits the licensee to use the copyright work and at the same time, the copyright owner promises not to grant any other licences, nor exploit the work. In practice, the grant of an exclusive licence can often be seen as equivalent to an assignment (*R. Grigg v. Raben Footwear [2003]*; *Chaplin v. Frewin [1966]*). Therefore, publishers are often happy to obtain exclusive licences by authors, rather than full assignments. In some situations it is difficult to determine whether a copyright owner has assigned their copyright or merely granted an exclusive licence (*Western Front v. Vestron [1987]*). This is a matter of construction of the agreement to determine whether a person is an exclusive licensee or an assignee.

In some circumstances, the court may see fit to imply a licence to use a copyright work, although the courts have mostly been reluctant to imply licences from the circumstances (*Phillips Electronique v. BSB [1995]*; *Cescinsky v. Routledge [1916]*). Terms may be implied in two situations: a) by law where there are 'inherent in the nature of the contract' or b) to fill gaps left in an agreement where it is necessary to provide 'business efficacy'. Where courts are implying terms for particular cases, they look at the existing express terms and the surrounding context. The implied term must be reasonable and equitable and must not contradict any express term of the contract (*Ray v. Classic FM [1998]*).

In Ireland, apart from the obligation to assign in writing, Section 2(10) on contract termination, notes that that 'where an act is the subject of an exception to copyright "it is irrelevant" whether or not there exists a term or condition in an agreement which purports to restrict or prohibit that act'. This is understood to mean that a contract provision purporting to override an exception would be void.

In Denmark, there is a general obligation of loyalty on the parties of an agreement. That implies, inter alia, that the initial owner cannot exploit her copyright to a work in a manner which is contrary to the right which she has transferred to the other party. For instance, a writer who has transferred her copyright to a book to a publisher, might not be able to publish the work as an e-book, if that has a negative impact on the publisher's possibilities to sell the book in hard copies. As a general rule, Section 53(3) of the Copyright Act provides for a contract to be restrictively interpreted.

Hungary lacks case law in this respect. Generally, the Copyright Act focuses on future modes of exploitation and future works. It does, however, provide an interpretative rule: if it's only the process of achieving a particular form of use which has been improved since the time the contract was concluded (e.g. applied more efficiently, in more favourable conditions or in a better quality as a result of the improvement of methods) the resulting use should not be considered a form of use unknown or unforeseen at the time.

Rights on future forms of exploitation

The laws of France, Germany, Hungary, Italy, Poland and Spain expressly regulate the transfer of rights relating to forms of exploitation that are *unknown* or *unforeseeable* at the time the copyright contract was concluded. In Hungary, any such licence would be considered null and void. If the agreement does not provide for the manners of use which the licence is intended to

apply to or does not provide for the licensed extent of use, the licence shall be limited to the manner and extent of use indispensably necessary for the implementation of the objectives of the agreement (Article 43 (5)). In Poland, Article 41(4) of the PrAut also covers modes of exploitation known at the time only.

Also, for instance, in France, assignment agreements must define very precisely the rights assigned: each form of exploitation has to be clearly mentioned in the agreement, and the assignees must ensure that the assignment clauses are not too broad. However, the assignment itself may be broad, stripping the author of her economic rights for the entire duration of copyright, but only if all the rights are clearly mentioned in the agreement.

In Germany, the UrhG states that a contract concerning future modes of exploitation (i.e. a separable and independent use that was economically and technically unknown at the time the contract was concluded, in German '*unbekannte Nutzungsart*') has to be concluded in writing. The author has a right to an additional remuneration if the exploiter commences a new form of exploitation (Section 32c UrhG). Alternatively, the author may revoke the right to use the work in future forms. To do so, she has to inform the exploiter within three months after the exploiter has sent information that a new mode of use will be commenced¹²⁴. Obviously, the revocation right is not applicable if the parties have already agreed on an additional remuneration.

In Italy, in the section regulating the publishing contract, the LdA provides rules on future forms. Article 119 states that 'future rights which may be afforded by subsequent laws and which provide copyright protection of wider scope or longer duration may not be included in the transfer'. In absence of an express stipulation, transfer shall not extend to the exploitation right in later modifications and transformations that may be made to the work, including adaptations to cinematography, broadcasting and recording upon mechanical devices. In absence of an agreement to the contrary, the transfer of one or more of the exploitation rights shall not imply the transfer of other rights which are not necessarily dependent on the right transferred, even if they are included in the same category of exclusive rights.

Similarly, in Spain, a transfer of exploitation rights shall never cover means of use or exploitation that do not exist or are unknown at the time of the transfer (Article 43(5) TRLPI).¹²⁵ Any contractual clause granting rights for unknown or inexistent means of exploitation will be ineffective. It remains an unsettled issue whether the presumptions of transfers provided for audiovisual works and works created under employment (and specially, computer programs), are also limited by these interpretative provisions.

In countries such as the Netherlands, the prohibition is not so expressly clear. We have already explained the tension within Article 2 of the Aw that make the transferability of non-existing (future) modes of exploitation disputable (with the use of 'in whole' being at odds with the '*purpose of grant*' principle).¹²⁶

¹²⁴ One of many flaws of this rule is, that the deadline to revoke the rights does not start when the exploiter's information was received but after it was sent off.

¹²⁵ See AP Madrid (sec.28), March 6, 2009, Westlaw.ES AC2009/977: the copyright licence on the *Gambrinus* image commissioned in 1906 by La Cruz del Campo (and currently owned by Heineken) does not include the means of exploitation online since those were inexistent at that time.

¹²⁶ There is some (lower court) case law on the inclusion of future exploitation modes in copyright licences. For example, freelancers' contributions to a newspaper that were (re)published on CD-ROM and on the Internet were regarded as new and independent exploitation modes. Since these modes were not foreseeable by the freelancers at the time of entering into the agreement in the 1980s, these new uses were not authorised by them. An important consideration was the appearance of the new media: CD-ROM differed from newspapers, as well as the website did differ from the newspaper in its contents and lay-out and the public to which it was accessible. This 'public' criterion was also used by the district court in Arnhem: authorisation of publications' inclusion in a paid database of LexisNexis did not include the inclusion of those publications in a free database that is available for a larger public: the publisher, as the expert, should have made such an exploitation mode explicit.

It all depends on the legal perception of rights in future exploitation modes. One view is to regard the future rights as already comprised in the copyright, since the exclusive rights granted by copyright are formulated rather openly. However, one might also consider future rights as future goods. In the latter view, the future rights will always be initially vested in the author, while in the former case the rights will vest in the owner of the rights. Even when considered as future goods, it is strongly arguable that a transfer of a copyright in whole does include current and future rights. When both parties envision a complete transfer of all rights in a work, one might argue that such a transfer meets the requirement of determinability. This is also the current government's point of view. It will become more problematic when an author transfers her right in part and a clear definition of the transferred right(s) has to be made. Namely, Article 2(2) requires that a transfer includes only those entitlements that are made explicit in the contract or necessarily derive from the nature and purpose of the contract. It is difficult to explicate future modes of exploitation.¹²⁷ Since case law in this field is scarce, however, the legal status quo is not entirely clear.

In a 2005 case of *Vrijbouter v. Van Driel* for the appeal court of Amsterdam, the court emphasised that transfers of copyrights have to be interpreted restrictively and that agreements transferring copyrights have to be interpreted in favour of the author in case of doubt. In contrast the opinion by the court in first instance, the appeals court does not exclude the possibility of transfer – or licensing – of future (unforeseeable) exploitation modes. It rather decided that in this case, no facts were furnished proving that a licence was given for the exploitation on new media, because there was only a limited description of the object of copyright. There were no explicit future right clauses in the contract and it is argued that if they were existent this could have made a difference to the outcome of the case.

In the UK¹²⁸ or Ireland, the transfer is allowed. In Ireland, for instance, there is no limitation regarding the duration of the transfer, or the fact that the transfer applies to future work or mode of exploitation.

Rights on future works

As in the case of the transfer of rights in future forms of exploitation, many national copyright acts are silent on this issue. In the Netherlands, the Aw remains silent on the possibility to transfer rights in future works. However, the requirement of '*determinability*' for the transfer of future goods under general contract law does not provide for too high a threshold given it only requires that the act delivering the future copyright contains information that is sufficient to identify, where necessary in retrospect, the good. That is, it may be sufficient to describe the topic or nature of the book, or even the mention of 'the next three books' or 'all future works' will be sufficient to identify the future works. However, the latter may be regarded as being against public morality, which may cause a transfer to be void.

The laws of France, Hungary, Poland, and Spain do regulate the transfer of rights on future works by expressly prohibiting general transfers of future works. Other countries allow it, albeit with a mandatory time limit or allowing the scope for renegotiation, for example under the obligation to pay additional remuneration (Germany or Italy or Hungary).

¹²⁷ For the case in which future rights clauses are added to the current exploitation modes, Lenselink argues that Article 2(2) DCA offers sufficient flexibility as to include future variants on the current modes made explicit; this does not apply to new, individual and definable media. The transfer does not only include the explicated exploitation modes, but also those that necessarily result from the nature and purpose of the contract. This can become problematic in the context of media convergence, where more vague terms such as 'digital use' are used. Lenselink offers as a solution that the risk lies in the exploiting party: if she wants to make sure that she owns the rights in certain exploitation modes, she should make it explicit in the contract.

¹²⁸ See Section 91 Prospective ownership of copyright which regulates transfer of future works and states that "future copyright" means copyright which will or may come into existence in respect of a future work or class of works or on the occurrence of a future event

In Germany, Section 40(1) UrhG determines that contracts concerning the granting of exploitation rights as regards future works which are not specified in any way or are only referred to by type need to be drawn up in writing. Furthermore, the agreement may be terminated by either party after a period of five years following its conclusion.

In Italy, if a contract has as its object future works it is void if it covers all the works or a category of works that the author can create without any limitation in time (Article 120 LdA). Without prejudice to the rules governing employment contracts and contracts for services, such contracts may not exceed ten years. If the work to be created has been specified, but the time within which such work must be delivered has not been determined, the publisher may at any time request the court to fix such term. In the case that a term has been set, the court may extend it.

The general principles relating to the sale agreement of future thing (as by Article 1384 of the Civil Code) also apply to the publishing contract for works to be created, with the result that the publisher's obligation to release the intellectual work is effective only when the author delivers the work complete, fair and final to the publisher, in order to satisfy the purpose for which the publication is intended (*sent. Trib. Milano 23/04/1998*). So, the contract should be void when the future works are not determined.

If the contract for future work must be resolved for the lack of delivery by the author within the deadline established in the contract, therefore the publisher is entitled to a refund of the sums paid, as an advance, to the author, with interests (*sent. Court Milan 23-4 -1998*).

Article 122 of the Italian LdA establishes that a publishing contract may be based on a given number of editions (*'per edizione'*) or a given period of time (*'a termine'*). The first type of contract shall afford the publisher the right to make one or more editions during a maximum period of 20 years from the date of delivery of the completed manuscript. The second type of publishing contract (*'a termine'*) provides to the publisher the right to produce the number of editions she may consider necessary within the specified period of time, which shall not exceed 20 years, and shall specify a minimum number of copies for each edition; in the absence of a specified number, the contract shall be null and void.¹²⁹

In Hungary, in general, the licence for the use of an indefinite number of future works shall be null and void. It is however possible to make an agreement for future works if they are defined at least by type or character (see Articles 44(1) and 52(1) of CA). If the licence agreement includes future works only by their type or character, either party may terminate the agreement with a 6 months' notice after the lapse of 5 years from the conclusion of the agreement and subsequently every 5 years thereafter.

In France, Article L.131-1 of the CPI states that general assignment of future works shall be null and void. We have seen that this rule, which is supposed to protect the author, can make ordinary situations with the author quite difficult, as for example in the working relationship between an employer and her employees.

However, in the case of publishing agreements, the author may grant the publisher the right of preference for certain future works. The law also provides for an exception to this rule concerning general agreements for the communication of the works of an author to the public.

Moreover, case law has specified that the prohibition of a general assignment of future works does not apply in the following situations:

- The work is a collective work, such as advertising creations.

¹²⁹ Please note that the terms specified do not apply the publishing contracts concerning the encyclopaedias and dictionaries, sketches, drawings, vignettes, illustrations, photographs and similar works, for industrial use, cartographical works, dramatic-musical and symphonic works.

- The works are clearly identified, as would be the case in the framework of a commissioned work.
- An agreement that provides for an automatic assignment of the rights as the different parts of the work are delivered.

In Spain, Article 43 TRLPI states that any global transfer of exploitation rights in all the works that the author may create in the future shall be null and void (Article 43(3) TRLPI).¹³⁰ Secondly, any stipulations whereby the author agrees not to create any work in the future shall also be null and void (Article 43(4) TRLPI).

Of course, agreements to create specific works in the future are permitted, as is any transfer of exploitation rights in a specific work to be created in the future, as long as the future works are somehow identifiable. What is forbidden is the global transfer of rights in all future works created by an author and the promise not to create in the future—which would amount to forsaking, among others, the fundamental right of literary, artistic and scientific creation specially protected by Article 20 of the *Spanish Constitution*.

On the contrary, in Denmark, Ireland and the UK, parties may enter into agreements regarding future works.¹³¹

For example, in Denmark, agreements transferring all rights to all future works will be subject to strict interpretation, cf. the general rule on interpretation in DCA section 53(3). In the legislative preparations for the 1961-copyright law it was discussed and afterwards refused to prohibit the transfer of future rights. Future forms of exploitations can be transferred, provided that they are sufficiently detailed specified in the agreement.¹³²

In the UK, a prospective copyright owner (usually an author) can also make assignments of future copyright. They can assign the copyright in works not in existence at the time of the agreement (*PRS v. London Theatre of Varieties* [1924]). However, it can only be made by an agreement in writing and, where this formality requirement is not met, it can only qualify as equitable assignment.

Provisions on remuneration

There are numerous ways to calculate the amount of remuneration to be paid to the author for the use of her work. The payment of remuneration generally takes either one of three forms: it can be a lump sum (*ex ante*), a proportional remuneration related to the exploitation, or a combination of the two. Proportional remuneration is linked to the actual commercial success of a work, since it is usually based on the revenues generated from the exploitation of that work. Meanwhile lump sum payments will generally be dependent upon the expected success and anticipated revenues.

The majority of national copyright acts have left the form of remuneration to be paid to the author to be determined by the contracting parties.¹³³ However, France, Germany, Poland and Spain do provide some measures in this respect.

In Spain, for example, the transfer (assignment or licence) may be in exchange of remuneration or for free. When remuneration is agreed, it should be a proportional participation (as agreed by parties) on the income from the exploitation of the work.

¹³⁰ This was already prohibited under the Act 9/1975, of March 12 on books.

¹³¹ CDPA s. 91 regulates the transfer of future copyright. 'Future copyright' is defined broadly as a copyright which will or may come into existence in respect of a future work or class of works or on the occurrence of a future event. Under this provision, the prospective owner can assign her rights in whole or in part by means of a written agreement, and the assignment will take effect automatically when the future copyright comes into existence.

¹³² There are landmark judgements in Denmark in this respect, in the guilds of film and music. UfR 1974.167 H and (ØLD 15.2.2007).

¹³³ Dusollier et al. 2014, p36.

Proportional remuneration is the general rule. Article 46 (1) states that the author will receive a '*proportional share of the proceeds of exploitation*' and the parties may agree on the percentage they want of such income. This provision is however not absolute as the following paragraph (Article 46 (2)) argues that, under some circumstances, the payment of a lump sum is justified. These circumstances include those where a proportional remuneration would be too difficult to manage, contributions to periodical publications, when the work is accessory or not essential to a larger work, dictionaries, prologues, etc.

In France, the law also establishes a general rule of proportional remuneration in the first paragraph of Article L 131-4 whereby an assignment shall comprise a proportional participation by the author in the revenue from sale or exploitation of the work.¹³⁴

The rules that authorise the payment of lump sum under the French CPI are, as in Spain, also formulated as exceptions to the basic right of the author to receive a proportional remuneration, that is when such proportional remuneration is impossible to calculate or not justifiable in view of the nature of the contribution.

In the framework of publishing agreements, Article L.132-6 of the CPI provides that in the case of library publications, the author's remuneration for the first publication may also be in the form of a lump sum, subject to the author's formal consent, in some cases.¹³⁵

Finally, it is of great interest that the French legislator has drafted specific provisions applicable to digital books only, in order to ensure that the remuneration of the author will be fair and adapt to the evolution of e-commerce.¹³⁶

Article L132-17-6 of the CPI states that:

- The publishing agreement guarantees the author fair and equitable remuneration on all revenue from the marketing and distribution of a book published in digital form.
- In case of sales by unit, the proportional share in the proceeds for the benefit of the author must be based on the selling price to the public before tax.
- In cases where the business model implemented by the publisher for the exploitation in digital form is based wholly or partly on advertising or other revenue indirectly related to the book, remuneration is due to the author based on such revenue.
- The author cannot be paid fixed amounts in the form of a lump sum (as opposed to proportional remuneration based on the exploitation of the work) for the transfer of all of her exploitation rights in a digital form. However, in the case of incidental or not essential for contributions referred to in 4 of Article L. 131-4, such a payment is possible.
- Fixed amounts in the form of a lump sum cannot be justified for a specific exploitation operation and any new operation allowing the use of fixed amounts must be accompanied by its renegotiation.

Article L132-17-7 of the CPI provides that the publishing contract must include a clause stating that the economic conditions of the transfer of rights of the book in digital form are to be re-examined by the parties (supposedly from time to time, or at the request of one of the parties).

Italy, as France, also refers to the retail price in the context of publishing agreements. As per Article 130 LdA, the author's remuneration shall consist of a share of the proceeds, calculated, in the absence of agreement to the contrary, as a percentage of the retail price of the copies

¹³⁴ The proportional participation of the author to the revenue has to be calculated on the retail price, that is to say the price paid by the public, before tax (exclusive of VAT). However, in certain situations, where the exploitation is carried out by a third party, and in particular abroad, it will be possible to use other bases for calculation, such as net receipts.

¹³⁵ Such as scientific and technical works, anthologies and encyclopaedias, illustrations for books or at the request of the translator, in the case of translations.

¹³⁶ Articles L132-17-6 and L132-17-7 CPI, the new provisions of the CPI created by the Order of 12 November 2014.

sold. In the contracts providing for sharing of proceeds, the publisher shall be required to render an annual account of copies sold.

Under Polish law, the rules on the payment of remuneration are rather vague. Article 43 of the PrAut provides that, if the contract does not indicate whether the transfer of the author's economic rights or the granting of licence was free of charge, the author shall have the right to remuneration.

Moreover, if the contract does not specify the author's remuneration, such remuneration shall be set taking into account the scope of the right granted and the benefits resulting from the use of the work. The PrAut further states that if the remuneration is based on proceeds, then the author has a right to receive information and to have access, as necessary, to the documentation being essential to determine such remuneration.

However, it should be noted that, even in countries where the remuneration of the modes of exploitation is compulsory, we see that other disputes among the parties arise. In Poland, a very typical contractual assignment provision lists all fields of exploitation named in Article 50 of the PrAut together with a clause according to which the remuneration specified is applied to all of the modes. Indeed, in Poland, the law requires separate remuneration (not necessarily royalties) but, according to our correspondent, this is often changed in contracts. Common models of remuneration are indeed varied but can generally be summed up as follows: (i) *'advance + royalties'*, (ii) *'lump-sum payment + royalties'* (generally the preferred model by authors) or (iii) *'royalties only'* – no advance payment or any other fixed payment is due. The authors' remuneration is completely dependent of the revenues the work brings.

Similarly, in France, unfair practices are perceived to be the royalty rates in publishing themselves because there are no cases specifying what percentage would be too low. In practice, the percentage is approximately between 4 and 8 per cent of the retail price.

In Hungary, where global transfers of rights are also prohibited, it is not so much about the level of remuneration but about the timing of the payment. Because retailers do not buy works from publishing houses but work as commissioners, the authors are paid only after the transaction is completed. Our correspondent notes this is a result of the underfinanced Hungarian book market.

By contrast, in Germany, section 32(1) of the UrhG refers only to equitable remuneration (which could be proportional remuneration or lump sum or a combination of the two). It recognises the general principle according to which any author is entitled to an equitable remuneration for the granting of usage rights in any case. Any other remuneration shall be *'equitable if at the time the agreement is concluded it corresponds to what in business relations is customary and fair, given the nature and extent of the possibility of exploitation granted, in particular the duration and time of exploitation, and considering all circumstances'*. If no remuneration is agreed, the author can claim the adequate remuneration. If the contractually agreed remuneration is not adequate, the author can claim that the contract is adapted to an equitable remuneration.

2.1.4 Legislative developments

The Netherlands, Spain, Germany and France are probably the countries currently undergoing the most significant legislative developments in copyright law. Each country focuses, however, on different aspects of copyright law.

In Spain the reform puts the emphasis on strengthening remuneration rights (arising from exceptions or limitations to exclusive rights) rather than focusing on strengthening the authors' bargaining positions in contractual negotiations. France, as we will see below, has also enacted important regulation regarding collective bargaining of authors. It also differs from those in

Spain and the Netherlands in that it focuses on labour conditions as a means to strengthen authors' competitive position.

The Dutch parliament has recently adopted the Act on Authors' Contract Law.¹³⁷ In contrast to its surrounding countries (e.g. Germany and France), the Netherlands had no specific and comprehensive regulation of the relationship between authors and exploiting parties.¹³⁸ The Act introduces several amendments to the DCA and provisions to protect the weaker position of authors when they get into agreements transferring or licensing copyrights. Where the possibility of licensing under copyright law is currently implied, this bill explicitly mentions this possibility in the new Article 2(2). In addition to the (partial) transfer of copyrights, this bill also requires a written deed for the granting of an exclusive licence (Article 2(3)). The provisions include a non-usus provision, a best-seller provision, limitations of future work clauses and a general remuneration right for transferring/licensing copyrights.

The Act also contains a provision stimulating the open access publication of publicly funded research, which is discussed in the section on contractual practice of scientific authors.

France has enacted important regulation regarding the collective bargaining of authors. In France, Article L132-17-8 of the CPI, enacted by the *Order of 12 November 2014* on the publishing of books, provides that an agreement can be entered into between professional organisations representing authors and publishers of the book sector (unions and CRMOs) to set certain terms and conditions of the publishing agreement.¹³⁹ This agreement can be made compulsory to all the authors and publishers of the sector by decree from the *Minister of Culture*. However, no agreement or decree has yet fixed the terms and conditions of the publishing agreement.

In Spain, Act 21/2014 provides a partial amendment and includes a right to fair compensation for news aggregation (Article 32.2 of the TRLPI). Indeed, Act 21/2014 introduced, at the end of the draft negotiation phase (it did not appear in any of the drafts that had previously been circulated) what is called the '*Google tax*': an exception for the benefit of news aggregators. The exception is subject to the payment of equitable compensation to press publishers and authors which is unwaivable and subject to compulsory collective management. According to the new rules on collective management, the level of equitable compensation must be negotiated by the parties.

Moreover, the law already envisages a more comprehensive overhaul of the existing legislative text within a year, when '*the government will start preparatory works for a wider reform of the law*'. It is however, difficult to predict the exact extent of any overhaul especially considering that government formation is still pending following the general elections of December 2015.

In Germany, the last reform of the rules concerning copyright contracts ('*Urhebervertragsrecht*') was enacted in 2002. The question concerning the reform of copyright law, in particular regarding equitable remuneration of authors in the digital age, is subject to intense debate in Germany. Copyright law was one of the focus topics of 2014 influential

¹³⁷ Wetsvoorstel Auteurscontractenrecht (Kamerstukken II 2011/12, 33308, 2).

¹³⁸ As discussed above, current authors' contract law is governed by general contract law and Article 2 Aw, which do not provide for a clear normative framework. However, this framework does not seem to sufficiently protect the author: while according to settled case law unclear provisions are interpreted in favour of the author, provisions that are evidently unjust or unfair for the author are not prohibited or subject to annulment.

¹³⁹ Such as: the conditions of the assignment; the conditions of termination of the publishing agreement in case the publisher does not ensure the continuous exploitation of the book; the calculation of the remuneration of the author for the exploitation of books published in digital form and in the absence of a retail price.

gathering of legal professionals (*'Deutscher Juristentag'*) in Hannover. However, the position of authors regarding remuneration or contractual practice was only dealt with on the side lines.¹⁴⁰

In November 2014, the *'Kölner Forum Medienrecht'* presented the so-called bill for the further strengthening of the contractual position of authors and for the improved enforcement of an equitable remuneration (*'zur weiteren Stärkung der vertraglichen Stellung von Urhebern und zur besseren Durchsetzung einer angemessenen Vergütung'*).¹⁴¹ The bill's initiators criticise the current legal situation's deficits concerning remuneration of authors.¹⁴² However, the proposal met strong opposition from representatives of publishers' associations.¹⁴³ The *Federation of Germanophone Translators of Literary and Scientific Works* (VdÜ)¹⁴⁴ has endorsed the proposals.¹⁴⁵ In December, the *German Federal Parliament's committee on the digital agenda* publicly discussed issues regarding the need to reform German copyright law.¹⁴⁶ One of the invited experts to speak on the topic suggested introducing a mandatory 75 per cent share for authors concerning all forms of exploitation of a work.¹⁴⁷ According to the expert, such a provision would prevent the unfair treatment of authors vis-à-vis those publishers or producers that have a much stronger market position.

In March 2015, the *Federal Minister of State for Culture and Media*, Monika Grütters, urged lawmakers to enact new copyright rules considering the changes caused by the digital revolution. Her ten theses concerning *'Cultural-Political Demands for Copyright in the Digital Environment'* (*'Kulturpolitische Forderungen für das Urheberrecht im digitalen Umfeld'*) comprise three aiming at strengthening authors' positions.¹⁴⁸ The *Federation of German Authors* (*Verband Deutscher Schriftsteller, VS*) and the *Association of German Book Trade* (*Börsenverein des Deutschen Buchhandels*) are currently in prolonged negotiations concerning adequate remuneration for e-lending.¹⁴⁹

This ongoing debate has notably led to a new draft of copyright contract law. The draft was published in October 2015.¹⁵⁰ It aims at strengthening the legal position of copyright holders and performing artists. It is based on the premise that, despite the 2002 reform, buy-out clauses remain common, and publishers and other users 'blacklist' copyright holders who insist on their right to adequate remuneration. This practice is supposed to be prevented with the new reform by introducing the possibility of legal action by unions against blacklisting. In general, the principle of adequate remuneration should also be emphasised.¹⁵¹

¹⁴⁰ <http://irights.info/artikel/von-allem-ein-bisschen-juristen-schwanken-zwischen-interessen-von-urhebern-nutzern-und-verwertern/23987>.

¹⁴¹ http://koelner-forum-medienrecht.de/sites/all/files/kfm/veranstaltungen/download/koelner_entwurf_urhebervertragsrecht_20141107_1.pdf.

¹⁴² <http://irights.info/artikel/karl-nikolaus-peifer-dieter-frey-trotz-reformen-bleiben-maengel-im-urhebervertragsrecht/24246>;
http://www.urheber.info/aktuelles/2014-11-05_koelner-entwurf-zum-urhebervertragsrecht-in-berlin-diskutiert

¹⁴³ <http://www.boersenblatt.net/832414/>

¹⁴⁴ Verband deutschsprachiger Übersetzer literarischer und wissenschaftlicher Werke

¹⁴⁵ Information provided by representatives of the VdÜ via email.

¹⁴⁶ http://www.bundestag.de/bundestag/ausschuesse18/a23/kw49_pa_digitale_agenda/342306

¹⁴⁷ http://www.bundestag.de/blob/343872/c3763d510ba95765d9259b472e63c256/stellungnahme_ott_o-data.pdf.

¹⁴⁸ <http://www.bundesregierung.de/Content/DE/Anlagen/BKM/2015/2015-03-10-positionspapier-urheberrecht.pdf?blob=publicationFile&v=4>.

¹⁴⁹ See <http://www.boersenblatt.net/819337/>.

¹⁵⁰ http://www.urheber.info/aktuelles/2015-10-05_urhebervertragsrecht-bmjv-veroeffentlicht-referentenentwurf.

¹⁵¹ <http://content1.mediabiz.de/download/RefEntUrErlSep15.pdf>.

In the UK, recent legislative debate has largely revolved around issue of (personal) private copying after in October 2014, the UK government introduced a new exception permitting private copying without any statutory compensation.¹⁵²

The *Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014* were introduced by the Secretary of State, a reform that created the new exception in UK law (adding Section 28B of the CDPA) that allows consumers to make a private copy of their legally purchased works for non-commercial purposes.¹⁵³

Recent case law on the issue of private copying comes from the music industry, that of British Academy of Songwriters, Composers And Authors & Ors, R v. Secretary of State for Business, Innovation And Skills [2015],¹⁵⁴ in which a number of music associations, including the British Academy of Songwriters, Composers and Authors (BASCA) and the Musician's Union, initiated legal proceedings against the Secretary of State for Business, Innovation and Skills asking for judicial review of the decision to create the private copying exception. The applicants argued that Article 5(2)(b) of Directive 2001/29/EC allows member states to create a private copying exception on the condition that the right-holders receive fair compensation. However, UK copyright law has now created a private copying exception without establishing proper compensation. Therefore, the UK private copying provision is not compatible with EU law. Mr Justice Green held that the Secretary of State was indeed in breach of European law when creating the private copying exception. '*The decision to introduce [the private copying exception] in the absence of a compensation mechanism is unlawful*' Mr. Justice Green said in his judgment.¹⁵⁵

In Poland, several issues are currently under discussion such as a study on desirable changes in copyright contract law (though remuneration is not a particular point of discussion) or the tariff-setting mechanism between CRMOs and *Copyright Law Commission*. Both ideas have been put forward by the Ministry of Culture. A proposal on fixed book prices is at parliamentary stage (April 2015). Additionally, as mentioned earlier in the National Implementation of the Rights section (2.1.2), the public lending right has been implemented in late 2015.

In Ireland, Hungary, Italy and Denmark the main debate is focused on the role of CRMOs and the implementation of the Directive 2014/26/EU.

CRMOs have grown over the past decade in Ireland. These help raise awareness among authors about their rights, give them confidence in asserting their rights, and provide supplementary income for secondary uses.

In Italy, there are several motions and bills requesting to abolish the legal monopoly of CRMO SIAE which could, indirectly, affect the contractual position or remuneration of all the authors. Mainly the debate is focused on the crisis of the book's market and the failure of the expectations on the e-book market.

¹⁵² Because of the narrow scope of the private copying exception, the UK Government decided against the introduction of private copying levies, with the justification that British consumers would not tolerate them. "They are inefficient, bureaucratic and unfair, and disadvantage people who pay for content", said the Minister.

¹⁵³ Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, available at <http://www.legislation.gov.uk/ukdsi/2014/9780111112700/>.

¹⁵⁴ EWHC 1723 available <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2015/1723.html&query=music&method=boolean>; The ruling does not mean that private copying is now illegal, or that CDPA s.28B has been repealed. It means that the judge will listen to submissions about the next step. This could mean that the government might amend existing legislation to allow for compensation of some sort or that the parties may ask for some issues of law to be referred to the Court of Justice of the EU.

¹⁵⁵ British Academy of Songwriters, Composers And Authors & Ors, R v. Secretary of State for Business, Innovation And Skills [2015] par.273.

2.2 Sector specific regulation

There is very little in terms of sector specific regulation in the countries under study. Furthermore, case law is scarce as disputes tend to be dealt with internally between author and transferee. There is, however, one significant exception in the law of some countries, the so-called '*publishing contract*', which we have already mentioned in previous sections. The existence of this sub-type of contract is observed in Italy, France, Spain and Germany. The first three regulate this type of contract in the Copyright Act itself. Germany, however, does so in a separate act. The so-called Publishing Act ('*Verlagsgesetz*', 'VerlG') is applicable to all works that are capable of being published. Generally, this means that the work needs to be printable, and in turn, capable of being reproduced and distributed in material form. This comprises works of fiction, non-fiction, scientific and also, as a general rule, journalistic works for newspapers and magazines.¹⁵⁶ In Spain, the feedback provided on the use of the publishing contract stresses the need to include specific regulation for digital publishing, the legal nature of which is still very much under discussion in Spain. Some Spanish authors argue that an improved bargaining position implies two differentiated contracts, one for print and one for digital publishing, instead of including digital, as many publishers do, as an additional form of exploitation under the scope of the traditional publishing contract (e.g. together with paperback, hardback etc.). This need for reform would likely extend to other new business models such as streaming platforms, print on demand etc.

According to the *German Federal Court of Justice*, contracts concerning translations are also publishing contracts as long as the translator leaves the translated work for the publisher to reproduce and distribute, which is common practice. This is, therefore, a way to distinguish this legal and commercial arrangement from others such as the one where the translator would merely be acting as a contractor to produce a work pursuant to Section 47 of the VerlG (under a '*Bestellvertrag*'), which would impose a duty to pay remuneration but *not* to publish the work.

An aspect of sectorial regulation worth noting because of its potential influence across other Member States¹⁵⁷ is the so-called *ancillary copyright for press publishers* in Germany. So far, however, no positive (economic or other) impact of the new right has been observed, either on the publishers or on the journalists.¹⁵⁸ In that sense, the ancillary copyright has so far failed to achieve its aim and our correspondent believes that this could also remain the case in the future. At present, a lawsuit between the CRMO for some of the press publishers (*VG Media*) and several search engine providers and aggregators (inter alia, *Deutsche Telekom*, *Google*) is taking place. Should the arbitration board at the *German Patent and Trademark Office*, with jurisdiction over this lawsuit, decide that search providers are indeed obliged to pay royalties to publishers for certain kinds of snippets and thumbnails displayed in search results (the only scope of application of the ancillary copyright), the search providers have already announced that they would take action. They would do so by (i) delisting these publishers in that case, (ii) shortening the snippets or (iii) not displaying snippets or thumbnails in the search results to the pages of these particular publishers at all. The end result would be that no royalties will be paid – just as without the ancillary copyright. Journalists, although having a legal claim to a fair share of the remunerations paid to publishers, do not and will not benefit, according to our

¹⁵⁶ Please note that we have proceeded to incorporate the provisions of the publishing contract under the general legal indicators used to feed the economic models (see Section 5, *Approach to Statistical Analysis*).

¹⁵⁷ This compensation for press publishers has been recently implemented in Spain, as we have described in the section concerning legislative developments. It is, therefore, too early to assess any practical impact.

¹⁵⁸ The lack of positive impact is spelled out and elaborated on in this study: https://www.bitkom.org/Publikationen/2015/Positionspapiere/Leistungsschutzrecht-fuer-Presseverleger-eine-Bestandsaufnahme/BITKOM-Bestandsaufnahme_Leistungsschutzrecht_03-2015.pdf.

correspondent. In fact, it could well be that if their articles were no longer displayed in the search results, publishers might suffer a loss of publicity, visibility and impact. As a matter of fact, evidence has shown that links without snippets are clicked on significantly less frequently than otherwise (a German experiment of the *Springer Verlag* has proved that already).¹⁵⁹ Moreover, since the ancillary copyright requires publishers to invest a significant amount of money (setting up a collecting society, lawsuits, negotiations etc.), the remuneration for the journalists might decrease if this investment proves to be a sunk cost. Another argument in favour of the potentially counterproductive effect of this compensation can be found in scientific and professional publishing where publishers are sometimes willing to surrender copyright if they can instead rely on hyperlinks to 3rd party websites and search results as a means to publicise their journals/books.¹⁶⁰

Dutch courts have also interpreted legal provisions applicable to the sectors under study. The Netherlands does not have a specific 'publishing contract'. However, Article 6:233(a) of the Dutch Civil Code provides that a provision, in the general terms and conditions, that is unreasonably onerous to the other party, is subject to annulment. According to Article 6:240, trade associations representing a professional or conducting a business may request a court to declare certain provisions in the general terms and conditions as '*unreasonably onerous*', which results in the provisions being annulable. No such legal provision exists for key stipulations and therefore, the distinction between key stipulations and general conditions is important under Dutch contract law.

In September 2006, the Amsterdam Court of appeal decided in a case between the *VSenV*, *NVJ*, *BNO* and the *Fotografen Federatie* (currently *DuPho*) on the general terms and conditions used by *Sanoma*, a media conglomerate and publishing house, for its agreements with commissioned freelance authors. The court ruled that, in contrast to the permission for first publication and the remuneration thereof, permission for additional publishing of the work, including permission for other forms of publication, is not a key stipulation. The same would apply to the provisions on the exclusivity of a licence, the duration of the reuse and the remuneration for this re-use. This meant that the provisions could be subject to review by the court, which ruled that the tenor established by *Sanoma* for exclusive use was too long at 18 months, where, according to the court, 9 months would suffice. In line with this reduction in time, the court also decided that the corresponding remuneration for re-use was not unreasonably onerous. Further, Dutch courts also provided some insight into what can be considered onerous terms in a freelance contract. For instance, the grant of an indefinite, non-exclusive licence to the publisher is not unreasonably onerous to the freelancer, as this would not impede the freelancer's commercial exploitation of her rights.

Other countries where terms are negotiated bilaterally, such as Ireland, have no or hardly any case law. In the opinion of our correspondent, expensive litigation costs have compromised authors' access to the judicial system, especially since the economic downturn hit Ireland in late 2007. In addition to the lack of specific regulation or case law, our correspondent notes that the quality of the contracts presented by publishers varies. One of the reasons for this may be that they are based on UK contract models that have been clumsily amended by the publishers' themselves.

In Italy, our correspondent notes that the regulation by law of the publishing contract, as is the case in Italy, does not actually lead to consistency in practice. Rather, as our correspondent explains, given that the law provides the freedom to negotiate, if a contract

¹⁵⁹ As confirmed by the *Axel Springer Verlag*, one of the principal proponents of the new legislation. Please see http://www.axelspringer.de/presse/Axel-Springer-schliesst-Datendokumentation-ab-Gravierender-Schaden-durch-verschlechterte-Suchanzeigen-bei-Google_22070688.html.

¹⁶⁰ Indeed, in the Netherlands, in the area of legal publishing, we are aware that commentary and literature are increasingly published online unconstrained by publishers' restrictions as long as they re-direct traffic, through attribution or other links to the publishers' websites/journal offerings.

does not correspond to the publishing contract described in the law, it would, in principle, be interpreted as a different contract and not an unlawful contract *per se*.¹⁶¹ Of course, how these types of contracts would be construed in Italy should be assessed on a case-by-case basis.

In Denmark, former versions of the Danish Copyright Act contained specific terms about the content of book publishing contracts for authors of books. Today, its Chapter 3 contains a few specific rules on the transfer of rights applicable for all types of works.¹⁶²

Until the liberalisation of the book market that took place between 2001 and 2011, a gradual, on-going process involving several developments, both public and private, political and economic, most contracts between publishers and authors of books, translators in print and illustrators followed the standard or '*normal*' contracts agreed on by the *Danish Authors Society* ('*DFF*') and the *Danish Publishers Association*. Many of the terms in these agreed contracts had their basis in the former specific book publishing terms mentioned above. The terms from the former standard or '*normal*' contracts are still considered guiding practice in the interpretation of specific unclear or incomplete publishing contracts. Nonetheless, the impact of digital business models makes the need for an overhaul of publishing contracts even more acute including completely new terms and definitions the use of these agreed terms of printed books becomes weaker every day.

As of 2011, consumer authorities and parliament introduced a gradual out-phasing of fixed book prices in Denmark (step by step from 2001 to 2011).¹⁶³ Concurrently, publishers also initiated several steps to further deregulate the book market, most notably by terminating the agreement on standard contracts for translators and illustrators and by generally leaving model contracts and standard fees to be negotiated individually by single publishers and single authors. According to the *DFF*, this was done largely to accommodate political changes (liberalisation and EU Single Market policies), but also because publishers wanted to be free from standard terms so they could better compete with large foreign players potentially entering the Danish market (which, as it turns out, has not happened so far). Allegedly, publishers also aimed to increase sales by being able to sell large quantities to supermarkets at reduced prices. With bookshops losing their monopoly on the sale of books, supermarkets started using bestsellers as loss leaders, forcing the bookshops to lower their prices in order to compete.

All in all, today, the *DFF* explains that publishers are trying to return to fixed book prices, a scenario that has arguably proven more profitable for publishers (versus the liberalised scenario in which volume is higher but profit lower) and because of the lack of remuneration standards in the context of e-books and public libraries, for instance. In general, this lack of standard contracts has proven to be source of internal conflicts over legal legitimacy of secondary rights, the *DFF* further explained.

Finally, to round up our overview of the main sectorial regulation and its challenges, it is important to mention the problem posed in some countries by the '*double assignment*' of rights to publishers and CRMOs, which is, to a large extent, the consequence of vague or unclear transfer clauses. The prevalence of this issue was best observed in the audio-visual industry, where, especially the (automatic) presumption of assignment rights in the context of audio-visual works led to confusion as to which rights remained with the authors. This

¹⁶¹ The contract that does not correspond to the draft of law it would be interpreted as a different contract provided it is aimed at achieving the interests worthy of protection under the laws, as by Article 107 of the *LdA* and Article 1322 of the *Civil Code*.

¹⁶² The interpretation rules for the benefit of the copyright holder in Section 53 (*scope of transfer*) and in Section 56 (*alterations and assignment of rights to third parties*), the publisher's mandatory obligation of usage in Section 54 and the unwaivable right to demand annual remuneration and insight in the foundation for remuneration in Section 57.

¹⁶³ In order to liberalise the Danish book market, an existing interim provision of the *Competition Act* regarding previous approvals of fixed resale prices on books was abolished as of 1 January 2011.

uncertainty has led authors to sometimes negotiating or assigning rights to CRMOs, which had (presumably) already assigned to the producer upon the production of the audio-visual work.

A similar issue appears to be happening in other countries, notably in the Netherlands, in the context of visual artists (and journalists), especially as regards new forms of exploitation.

Blendle, launched in 2014, is a Dutch online pay-per-article platform. It essentially aggregates news from different newspapers in a single interface. The reader pays small amounts to read the desired article. The business model is akin to Apple's iTunes/App Store with the price of the article set by the publisher and Blendle taking a 30% cut over the retail price.

The business model of *Blendle* has given rise in the Netherlands to a form of exploitation consisting of a 'loose article' ('*losse artikelen*'). *Pictoright*, a CRMO for visual artists, has drafted a new adhesion contract which includes the transfer by the visual artist of the right to license individual works as required by *Blendle*. Similarly, *De Persgroep*, a media conglomerate owner of several Dutch newspapers, also expects visual artists to transfer this right to them as stipulated by their general contract conditions, allowing *De Persgroep* to negotiate the licensing conditions with *Blendle* directly. If authors, however, sign with *Pictoright*, the publisher cannot rightfully aspire to have that same right transferred. It would appear that this has caused some confusion among visual artists, members of *Pictoright*, who have tried to negotiate with *De Persgroep*.

All in all, the overwhelming feeling is one of mostly contractual ambiguity as to what type of rights and uses are transferred which might lead to abusive, or at least confusing, situations. As a recent authors' survey in the UK points out: '*retaining copyright puts authors in a much stronger position in terms of negotiating where and how their works can be used. The best contracts clearly set out which rights authors are retaining or transferring. It is becoming increasingly important for writers to prove their ownership of rights in their works in order to secure key sources of income*'.¹⁶⁴

We have no additional evidence of other current sectorial regulation that plays a role in the shape of the industries analysed in this study.

2.3 Contractual Practice: trends, collective bargaining and model contracts¹⁶⁵

2.3.1 Authors of books

Authors of Books in 'Traditional' Publishing

The relationship between the author and the publisher is established through (publishing) contract. Even though contractual relations frequently exceed one single book, one cannot speak of an employment. Authors of books are most generally freelancers. Below is an overview of the agreements in place in the different Member States.

Germany

In Germany, the current model contract for publishing contracts ('*Normvertrag für den Abschluss von Verlagsverträgen*')¹⁶⁶ was negotiated between the Federation of German Authors ('*Verband Deutscher Schriftsteller*', VS), which belongs to the United Services Union ('*Vereinte*

¹⁶⁴ <http://www.alcs.co.uk/Documents/what-are-words-worth-now.aspx>.

¹⁶⁵ When we refer in the following pages to the existence of model contracts we will be referring to the relatively complete contract that usually results from negotiations between representatives of authors and publishers in each sector, adopted as a template and referred to by freelancers in the sector. Contracts can be drafted under the auspices of CRMOs, trade unions etc.

¹⁶⁶ https://vs.verdi.de/++file++519f379f6f68445ec0000442/download/must_Verlagsvertrag.pdf.

Dienstleistungsgewerkschaft, ver.di), and the Association of German Book Trade (*Börsenverein des Deutschen Buchhandels*). It is in force since February 6, 2014. According to the representative of the VS, while the model contract merely represents guidelines for the contracting parties, there is a general willingness amongst both sides to generally apply its terms. The VS considers the model contract fair and adequate.¹⁶⁷ The biggest change, when compared to the previous model contract, concerns rules on digital exploitation of a work.

Central to the model agreement are the right of reproduction and distribution of the work (Section 2(1)(a)). This right explicitly comprises the right of distribution via electronic media such as e-books, Section 2(1)(b). Included is also a permission to exploit the work by means of hitherto unknown forms of exploitation.

In fact, according to a survey conducted by the VS in 2013, 64 per cent of the publishing contracts with authors now include a clause concerning the digital exploitation of the work.¹⁶⁸

According to Section 2(2) of the model contract, the author agrees to assert the rights stemming from the statutory remuneration rights conjointly with the publisher at the relevant collecting society *VG Wort*. However, there is currently a lawsuit pending before the *Federal Court of Justice* concerning the right of publishers to obtain a share of statutory remuneration that might render this clause obsolete.¹⁶⁹ In any case, regardless of the outcome of the case, the position of authors would not deteriorate.

In this sector, authors will usually have to be remunerated continuously based on a profit participation of book sales.¹⁷⁰ The VS has negotiated a joint remuneration agreement pursuant to Section 36 of the *UrhG* with a number of German publishers.¹⁷¹ It stipulates a default remuneration of 10 per cent of the retail price of a book (Section 3(1) of the agreement).¹⁷² There are differences between online and offline exploitation, the remuneration for the former frequently being considerably lower. The VS is attempting to initiate legislation to establish statutory remuneration for digital exploitation of works.¹⁷³ Also, it should be noted that the VS cannot claim fair remuneration on behalf of its members. There is an on-going initiative to install such a right to pursue class action.¹⁷⁴

Since the conclusion of the *joint remuneration agreement*, remuneration is generally considered fair.¹⁷⁵ However, according to the 2013 survey conducted by the VS, 69 per cent of German authors obtain less than 10 per cent of a book's retail price as remuneration.¹⁷⁶

In fact, according to the representative of the VS, only about 10 per cent of authors are able to live off writing alone, the other 90 per cent write part-time while having another job.¹⁷⁷ According to statistics published by the *artists' Social Insurance* (*Künstlersozialkasse*, *KSK*), the median income for artists belonging to the chapter 'word' is currently 15,959 euro (female

¹⁶⁷ Phone interview with VS representative Imre Török, 1 April 2015.

¹⁶⁸ <https://vs.verdi.de/presse/pressemitteilungen/++co++dd95f228-b3f2-11e2-8def-52540059119e>.

¹⁶⁹ <http://irights.info/artikel/vg-wort-vs-vogel-warten-auf-den-bgh/18834>.

¹⁷⁰ Fromm/Nordemann, § 32 *UrhG*, at 60.

¹⁷¹ http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gemeinsame_Verquetungsregelnpdf?blob=publicationFile.

¹⁷² There are differences between online and offline exploitation, the remuneration for the former frequently being considered lower. The VS is attempting to initiate legislation to establish statutory remuneration for digital exploitation of works. It should be noted that the VS cannot claim fair remuneration on behalf of its members. There is an ongoing initiative to install such a right to pursue class action.

¹⁷³ Phone interview with VS representative Imre Török, 1 April 2015.

¹⁷⁴ Id.

¹⁷⁵ Assessment by the general secretary of the Federation of German Authors,

<http://vs.verdi.de/themen/nachrichten/++co++3be9d754-6663-11e3-8876-52540059119e>.

¹⁷⁶ <https://vs.verdi.de/presse/pressemitteilungen/++co++dd95f228-b3f2-11e2-8def-52540059119e>.

¹⁷⁷ Id.

writers) and 21,427 euro (male writers), respectively.¹⁷⁸ One wonders if this can be considered a sufficient income.

Finally, on the subject of case law, we have identified two relevant decisions in Germany: BGH GRUR 2011, 810 (*'World's End'*) and BGH GRUR 2010, 1093 (*'Concierto de Aranjuez'*).

In the first, according to the *Federal Court of Justice*, a publishing contract may, by implication, entitle the publisher to pursue subsequent editions. In particular cases, the provision of Section 5(1) of the Publishing Act, which stipulates that, in case of doubt, the publisher only has the right to publish one edition of a work, does not apply if the overall contract and other circumstances like statements made by the author or publisher suggest otherwise.

In the second decision, also dealing with the nature of the publishing contract, the court states that, in order for a contract between a publisher and an author to be considered a publishing contract within the meaning of Section 1 of the Publishing Act, it is not necessary that the author grants the publisher exclusive reproduction and distribution rights. The relevant provision pursuant to Section 8 of the Publishing Act is rather subject to waiving, if the contractual parties so agree.

The Netherlands

In the Netherlands, the latest Dutch model agreement for the publication of (originally) Dutch literary works, which dates from 2011, also deals with the exploitation of e-books as a primary exploitation right and contains arrangements regarding the licence and transfer of copyrights and provide a framework to fix any individually negotiated remuneration (percentage) for each licensed or transferred exploitation right and ancillary right.¹⁷⁹ There used to be arrangement as to the minimum royalties, but this was infringing competition law according to the Dutch competition authority. However, the model agreements are still accompanied with explanatory notes that also contain tariffs and percentages that are regarded as the norm by the concerned associations of publishers and writers.

Before the current model agreement, the exploitation right for e-books had not been implemented in the agreement as a primary exploitation right. Therefore, a model addendum to the model agreement was created, granting the publisher an exclusive licence for the exploitation rights for e-books in return for a royalty arrangement. This addendum is used both for the licensing of new works (yet to be published in paper as well) as well as for old works (not yet published).

With the current model agreement, though, the exploitation of e-books *is* included as a primary exploitation right. According to this agreement, the author grants the publisher the exclusive licence to exploit the (yet to be created) work, including the right to enforce the licensed rights.¹⁸⁰ The publisher has the exclusive licence to publish the work as a paper book or e-book, or to conclude contracts with third parties to exercise these exploitation rights.¹⁸¹ *E-book* is broadly defined as a '*digital file containing the contents of the work*'.¹⁸²

The licence also (explicitly) includes the right to publish in another language than Dutch, the partial reproduction of the work in compilations, databases or otherwise, to publish a part of the work as a prepublication or otherwise, the (partial) reproduction by fixation on image or

¹⁷⁸ http://www.kuenstlersozialkasse.de/wDeutsch/ksk_in_zahlen/statistik/durchschnittseinkommenversicherte.php.

¹⁷⁹ Essentially, the author grants the publisher the exclusive licence to exploit the (yet to be created) work, including the right to enforce the licensed rights. The publisher has the exclusive licence to publish the work as a paper book or e-book, or to conclude contracts with third parties to exercise these exploitation rights.

¹⁸⁰ Article 1(1) and (2) of the Model Agreement for Dutch Literary Works (MADLW).

¹⁸¹ Article 1(3) and (4) MADLW.

¹⁸² Article 1(3) MADLW: 'Een e-boek is een digitaal bestand dat de inhoud van het werk bevat.'

sound carrier and the distribution thereof, and the communication to the public of the unaltered work in whole or in part.¹⁸³ Provided that the author has given her written authorisation, the exclusive licence is also regarded to include the publication and exploitation of the work in audio format (such as audiobooks), the publication of the work as a feuilleton in a newspaper or magazine, the adaptation of the work for radio, television, film or other audio-visual productions, and for reproduction or publication of the work in electronic form and for theatre.¹⁸⁴ In case of the author's written authorisation, the publisher may grant a licence to another publisher for a separate publication without entitling that third party to license it further.¹⁸⁵ The publisher gets the first option on the licence of exploitation rights that are based on the publication of the work, but at the time of concluding the contract were not foreseeable.¹⁸⁶ One of the larger publishers in the Netherlands has received widespread publicity because its contractual agreements with authors now demand that these authors pay a percentage of their public readings to the publisher.¹⁸⁷ This use (public performance) is not transferred nor licensed to the publisher in the model agreement and the percentage is payable even when the publisher is not involved in the (organisation of the) public reading.

For the purposes of remuneration, there is a general distinction between the main rights and ancillary rights, reflecting the primary and secondary exploitation of a work. Secondary exploitation also includes the adaptations of a work (including in other forms such as audio books or film works). Remuneration for digital exploitation is often calculated in a way strongly deviating from 'traditional' exploitation, because of their different nature. While remuneration for paper books may be easily calculated on the size of the circulation, for digital exploitation revenue for the publisher might be based on access to the work (rather than sold copies). For example, educational works are often included in a database with paid access. The calculation of remuneration and revenues for these kinds of exploitation are therefore more complex (according to some respondents on the publishers' side).

For each of these rights, a certain royalty percentage is negotiated between the author and the publisher. This percentage primarily applies to the net income of the publisher from the licensing to third parties of those rights, but also applies to the exploitation by the publisher himself where the exploitation is not covered by the *honoraria* set in Article 10 or a separate agreement.¹⁸⁸ The *LUG (Literary Publishers Group)* and *VvL (Writers' Union)* regard a 60-40 per cent distribution between author and publisher respectively as the norm where the exploitation is licensed to a third party and that party bears all the risks of the exploitation (not being a mere intermediary or the like).¹⁸⁹

The agreed percentages are calculated on the sale price fixed by the publisher, the net revenue from e-books, or the income from the licensing of exploitation rights or rental, all free of VAT.¹⁹⁰ The norm tariffs are approved by the *LUG (Literary Publishers Group)* and the *VvL (Writers' Union)*, and may not deviate to the disadvantage of the author.¹⁹¹ Further, separate

¹⁸³ Article 1(5) MADLW.

¹⁸⁴ Article 1(6)(a) to (c) MADLW.

¹⁸⁵ Article 1(6)(d) MADLW.

¹⁸⁶ Article 1(8) MADLW.

¹⁸⁷ See for example <http://www.volkskrant.nl/boeken/uitgever-eist-meer-geld-van-schrijvers~a3895436/>.

¹⁸⁸ Article 10(1) MADLW. That is, (i) publication in paperback or bound edition. The norm tariffs are 10% for 1 to 4000 sold books, 12.5% for more than 4000 books, 15% for more than 10.000 books, and 17.5% for more than 100.000 books (unless it concerns a reprint of less than 1500 books, so the 15% stays to apply) (ii) a 'mid-priced' publication: a reprint into a new version of the book, sold against a lower resale price (but higher than that of the pocket form). The norm tariffs are 9% for 1 to 3000 books, 10% for more than 3000 books, and 12.5% for more than 50.000 books, (iii) publication in pocket form. The norm tariff is 8% and 10% for more than 30.000 sold copies and (iv) publication in e-book format. The norm tariff is 25% of the net revenue from each issued licence.

¹⁸⁹ Explanatory notes to Article 1(4) MADLW, which also can be found in the MADLW.

¹⁹⁰ Article 10(2) MADLW.

¹⁹¹ Explanatory notes to Article 10 MADLW.

percentages are agreed upon for sale by book clubs and for copies sold with a rebate of 25 per cent or more.¹⁹² As an option, the author and publisher may agree on an advance payment, which is deductible from the income for the exploitation of the work, including the exploitation of the ancillary rights.¹⁹³

The model publishing agreement for Dutch literary works also contains a provision concerning several remuneration rights and collective rights.¹⁹⁴ These include the reprography rights (to the extent not already statutorily managed by *Stichting Reprerecht*), for which the author gets 50 per cent. However, according to field respondents, there is a recent trend of authors also transferring their reprography rights to the publishers. An example clause is one where the author assigns the right of compensation for reprography to the publisher in line with, for example, Article 16B of the DCA, describing the private copying exception¹⁹⁵. This clause is rather ambiguous concerning what is included: it is not clear whether it also includes reprographies falling under the reprography right. Also, regarding the lending rights, which are transferred to Lira, the author's share in the remuneration will be distributed according to the distribution regulations of Lira: the distribution between publishers and authors is 30% and 70% respectively. The model publishing agreement for children's books contains a provision identical to the above.¹⁹⁶ The model publishing agreement for educational books provides that the publisher may subcontract rights, to a CRMO on behalf of the author; as examples, it mentions reprography rights, rights for use in compilations, and the rental and lending rights.¹⁹⁷ Respondents from the authors' side note that reprography rights are recently included in the right transfer, but how this affects the remuneration is not yet clear.

France

In France, the parties involved are, almost exclusively, publishers and authors, and CRMOs and professional unions do not have decisive influence on the contractual practices of the sector. Nevertheless, this should change in the near future. Article L132-17-8 of the CPI, enacted by Order of November 12, 2014 on the publishing of books, provides that an agreement can be entered into between professional organisations representing authors and publishers of the book sector setting certain terms and conditions of the publishing agreement. That agreement can be rendered compulsory for the entire sector by a decree.¹⁹⁸

In parallel, the CPI has been recently modified to include specific rules applicable to all agreements entered into between an author and a publisher for the publishing of printed and digital books. One of the most noteworthy rules is that whereby the conditions relating to the transfer of exploitation rights in digital form are determined in a separate part of the contract, on pain of nullity of the assignment of these rights (Article L132-17-1 of the CPI).

Other significant measures, and this concerns all the authors under study, are those whereby, in February 2006, the Ministry of Education entered into five agreements with the beneficiaries of the book sector, music, audio-visual, the press and the visual arts to be entitled to use the works as part of educational uses.¹⁹⁹ Fees are charged on the basis of a flat rate negotiated

¹⁹² Article 10(3) & (4) MADLW.

¹⁹³ Article 10(5) MADLW.

¹⁹⁴ Article 1(7) MADLW.

¹⁹⁵ In Dutch, the provision reads as follows: 'de auteur draagt aan de uitgever over het recht op vergoeding voor reprografieën zoals, onder meer, maar niet beperkt tot, bedoeld in artikel 16B Auteurswet'.

¹⁹⁶ Article 1(7) MADCB.

¹⁹⁷ Article 5.8 MAEB.

¹⁹⁸ The relationship between the author and the publisher is based on copyright law (with payment of royalties) and not employment law. A global transfer of rights on an exclusive basis is provided for in most agreements in practice, but with clauses describing in detail the rights assigned (in compliance with the provisions of Article L131-3 CPI). These rights include: reproduction right, making the work available to the public, adaptation rights (subject to the moral rights of the author).

¹⁹⁹ The covered uses are (i) the representation of works in the classroom, seminars and conferences, (ii) incorporating the works in subjects of examination and exams, (iii) adaptation of works by

with the Ministry of National Education and the royalty rates can vary in practice approximately between 3 and 10 per cent, and only very few authors are paid an advance on royalties.²⁰⁰

Before 2006, agreements on the remuneration of authors were already agreed to by the Ministry of Education and CRMOs. These agreements authorised the photocopying of works (involving all types of publications, French and foreign, that is, pages of books, newspaper articles, excerpts from journals and sheet music or lyrics, etc.) for educational purposes, in exchange for payment by the Ministry of Education and other public establishments of an annual fee to the CRMO CFC for the remuneration of the authors.

Act No 2006-961 of August 1, 2006 (i.e. after the 2006 agreements) laid down Article L.122-5, 3° of the CPI, a copyright exception for educational purposes. A negotiated flat fee must compensate the use; this fee has been fixed at 550,000 euro per year. The law however excludes the following situations from the scope of the exception:

- Works designed for educational purposes, as well as sheet music, are not covered by the exception.
- Entertainment and recreational activities.

The 2006 agreements, nevertheless, have a broader scope than the abovementioned exemption. The fees are relatively important, but of course the agreements do not only apply to the authors concerned by the present study.

The United Kingdom and Ireland

In the UK, where much is left to contractual freedom, the feedback received has revolved mainly around what are deemed by authors to be unfair practices in publishing contracts. According to the *Author's Licensing and Collecting Society (ALCS)*, the following may be regarded as unfair contract terms that occur commonly:

- Many contracts contain stringent obligations on authors and contain assignments of all rights in the work for the life of copyright while containing very limited obligations on publishers to print, publish, sell or otherwise exploit the work. An author may put years of work in to a book and even make a financial contribution towards publication and can then find that the publisher prints only a few copies and makes no effort to promote the book while still holding all the author's rights.
- Contracts commonly last for the life of copyright with no opportunity for review. This means that a publisher can continue receiving the lion's share of all income and prevent an author from attempting to re-strengthen sales for example by self-publishing.

In Ireland, the standard practice in relation to rights in the trade publication sector is that the publisher produces a contract which contains an exclusive licence to publish with an additional grant of subsidiary rights, the nature of which will vary. The amount of the advance (if any) and the size of the royalty will depend on the bargaining power of the author. Where educational publications are concerned, the contracts are customarily '*all-rights*' contracts, to permit the publisher to use the material in different contexts, such as in an anthology or to create a workbook.

A typical contract for the sector would, according to our correspondent, look as follows:

students in class, (iv) reproductions for archiving teaching and research work (v) the posting on the Intranet of the educational institution of works only for purposes of illustration of teaching and research work.

²⁰⁰ According to the '*Barometer of relations between authors and publishers*', recently published by SCAM and SDGL based on a survey carried out amongst 1800 people, 69 per cent of authors perceive as less 10 per cent of royalties and 19 per cent of them would even be paid at a rate lower than 5 per cent of the sale price (they were 15 per cent in 2013), which has caused, for the first time, the authors to organise a protest demonstration at the French *Salon du Livre* (book fair) of 2015.

- The author grants to the publisher the 'exclusive right and licence to publish, publish and sell the work or any adaptation abridgement or substantial part thereof in volume and in other forms (including electronic book form) in all languages throughout the world and to license others to do so during the legal term of copyright and all renewals and extensions and revivals of that term'.
- The advance is split into a payment on execution of the contract and another on first print publication.²⁰¹
- The royalties may be different for markets in Europe and the USA. In this instance, the royalties are similar. The royalty is divided into a percentage of cover price (10 per cent in this instance) for hardback sales up to 5,000 copies and 12.5 per cent thereafter. The royalty on paperback sales is also 10 per cent. There are smaller percentages on non-trade and specialty market sales. There are some 'no royalty' copies, such as presentation copies.
- The royalty for electronic books is 25 per cent of price received by the publisher.
- Audio editions including both CD and digital download carry a royalty of 7.5 per cent of the cover price for the sale of physical copies and 15 per cent of the price received for digital downloads.
- The publisher has 'exclusive control' of named subsidiary rights, with different royalties applicable, calculated on sums received by the publisher (e.g. serialisation and extracts (90 per cent pre-publication and 75 per cent post-publication); US rights sold to another publisher (80 per cent); translation rights (80 per cent)).
- In many of the available contracts electronic rights are dealt with in an ambiguous way. In addition to the provisions above granting the exclusive right to publish in e-book form and specifying a royalty for physical e-book and digital downloads, '*electronic publishing rights*' are granted as a subsidiary right, attracting a royalty of 50 per cent of sums received by the publisher. The term '*electronic rights*' is defined as '*the right to produce any means of distribution or transmission reproduced in non-dramatic form whether now or hereafter known or developed including but not limited to electronic and machine readable media and online or satellite-based transmission intended to make the work available to the public for reading. Also the right to produce or license the production of any system or programme derived from or utilising storage or retrieval systems.*'
- Moral rights may be waived. There is no consistent practice in this respect, however, as reported by our correspondent.
- It is uncommon to find provisions regarding remuneration rights. Through the relevant CRMO the author will receive 50 per cent of the relevant CRMO collections.

The Irish Writers' Union plays a role in helping authors with their contracts. It has developed model contracts which are published on its website. The Union expresses its dissatisfaction, however, with the fact that increasingly authors are expected to agree to indefinite terms and broad transfer of rights (extending to those that are not intended to be exploited).²⁰²

Denmark

In Denmark, the DFF explains that, due to the liberalisation of the Danish book market we mentioned in the previous section, the assignment of rights in book publishing contracts is usually entered into for the initial publishing, i.e. making the work available for the public. Publishing contracts in print for authors of books are usually based on specific modes of exploitation, in line with the traditional (print) publishing contracts. Exploitation of rights in print is divided into different editions due to different royalty tariffs, ordinary edition (hard

²⁰¹ Our correspondent reports on feedback regarding a trend developing for the author's royalty to be based on 'net' receipts of the publisher. Authors are becoming concerned about this. Clearly, the definition of 'net' is important but it is in general impossible for an author to know whether or not the 'net' receipts have been properly calculated, irrespective of the definition.

²⁰² Most allow for recovery of rights for failure to exploit but it can be difficult for an author to prove that she is entitled to a reversion of the rights.

back) and secondary editions – cheap edition/paper back, book clubs, and supermarket editions. The formulation of the overall scope has usually been '*the right to publish the work in print, in Danish, within 12/18 months of the contract date... all other rights remain with the author*'.²⁰³

However, due to the emerging digital publishing market publishing contracts now usually also cover digital exploitation of the works. Until now, the digital exploitation had been a secondary form of exploitation, usually stated in a separate contract. Increasingly, though, contracts include 'digital exploitation' as a starting point, and it is also more and more common that it is formulated as 'any and all' rights and forms of exploitation, including future rights.

In any case, the DFF negotiates model contracts with specific publishing companies, especially with regard to terms for digital exploitation of literary works. There are model contracts for the publishing of e-books from 2010/2011 that may be subject to renegotiation of all terms after 2 years. The model contracts contain, for example, a definition of when an e-book is considered 'sold out' as the basis for reversion of rights. The model e-book contract is also the basis for the publishers' making the e-book available through e-Reolen, the Danish public e-book library service. Negotiations regarding the terms for publishing books as print-on-demand are pending. E-Reolen, an initiative of public libraries and publishers to provide free access to a major selection of commercial available e-books has proven to be a success in Denmark. However, in order to protect growing digital markets, several leading publishing houses have since decided to withdraw from this free access library service.²⁰⁴

Italy

In Italy, the *United Federation Italian Writers (FUIS)* confirms that there is no collective bargaining as regards book authors but that they are drafting a model contract for *digital* editions which they consider key to protect their rights, just like writers' and translators' associations in most Member States.

In this respect, our Italian correspondent draws our attention to how many of the current clauses in the traditional publishing contract for prints, are, in fact, inapplicable to contracts for the publication of e-books (e.g. Article 122 of the LdA on the number of copies to be printed). A new regulation would therefore appear advisable, as our correspondent explains.

Currently, in Italy, it's usual for the publisher to acquire the economic rights over the book in its entirety, reserving the right to publish the work in electronic format. Further, the author commits not to take part in competing initiatives that could harm sales of the work. This author's fee is a percentage on the sales of the work. The contract duration is usually annual, with the possibility of automatic renewal and withdrawal option for both parties.

Hungary and Poland

In Hungary, as in Poland, there are no model contracts or collective bargaining. Perhaps, the most pressing challenges in Hungary revolve around digital publishing. The majority of licences still only cover the reproduction and distribution rights of the author whereas law and doctrine exclude any interpretation of those rights that would extend their scope to the making available right. The latter should be expressly agreed in the contract. In any case, our correspondent explains that the e-book market remains underdeveloped in Hungary (a combination of e-commerce and lack of consumer confidence, concerns over the profitability of the business model etc.).

²⁰³ DFF negotiates model contracts with specific publishing companies. Model contracts negotiated with the two major publishing companies in Denmark are likely to become guiding practice for reasonable terms for publishing contracts in general. However, as the association, according to them, lack bargaining power these remain 'gentleman agreements' with the publishers.

²⁰⁴ M Visby, *Danish Translators and Digital Rights. A Brief Report*. Mr. Visby is the Chairman of the Danish Translators' Association.

In Poland, where the law requires separate remuneration (see Provisions on Remuneration, under 2.1.3.), in practice royalties are generally between 12 per cent and 35 per cent, though the calculation of these royalties is often not based on actual revenue or profits but on a '*contract price*' established in the agreement. That is, we will assume that the contract grants the author 15 per cent of royalties and defines that the relevant price is 60. Therefore, if the publisher were to sell 100 items at 100 each (that is, the revenue is 10,000), the author will receive 15 per cent, calculated not on the basis of the actual revenues but the revenues as defined in the contract ($100 \times 60 = 6,000$).

The Polish e-book market is still relatively small; therefore, it would be premature to say that it has negatively affected authors. The e-book clause, if we may call it this way, is as a rule an additional clause in the publishing contract, as it would be very rare to have a contract for a new work limited exclusively to e-books (the existing contract can be extended to include them).

We have not been able to go deeper in our analysis of the workings of the contractual relationships between authors and publishers in Spain.

Self-Publishing book authors

As of today, and there are still few legal implications to self-publishing, which very much remains a tool for authors to market their work and for companies to offer new services and compete with traditional publishers (e.g. Lulu, Amazon). Going forward, self-publishing might remain the alternative 'traditional' publishing or might also grow to become yet another instrument which is negotiated in the context of a publishing contract. That is, an integral part of '*reservation of form*' clauses in authors' contracts, allowing for print, digital or self-publication depending on the commercial strategy put in place by the publisher. A related turn of events might actually be one whereby the traditional publishing contract arranging for a print edition becomes the exception and thus, the investment rationale of the publishing house is put into question (e.g. the financial investment that goes into a digital-only edition to 'test the waters' is significantly lower than in a print edition).²⁰⁵

Some interesting considerations put forward by correspondents are the disadvantages faced by self-publishing authors, who are not eligible to become members of the main professional associations or how in Italy, self-publishing is actually considered by authors as the 'safer option', given the proliferation of non-professional publishers offer authors print-only contract at high prices. Our Polish correspondent reports that self-publishing is becoming increasingly popular, even though it is often hidden under a 'regular publisher' façade whereby they don't play a publishing role but facilitate self-publishing. We can therefore assert in some cases the certain ambiguity in terms which is sometimes used to the advantage of some parties. In fact, in relation to this point, the emergence of self-publishing seems to have blurred the lines between the traditional roles of the publisher and the author and has potentially created lack of clarity as regards the obligations, and financial investment, of the parties and the calculation of remuneration. Self-publishing is also becoming popular in especially academic and education publishing in some Member States.

In the Netherlands, there is no specific provision in copyright or contract law addressing self-publishing, just as there is no sector specific regulation for publishing in general, but the authors contract law bill has introduced a provision to facilitate self-publishing in a way that scientific authors of publicly funded research have the right to self-archive in open access repositories.

Otherwise, as regards general literary self-publishing there are several parties active in the Dutch market who act as aggregator, agent or mediator, enabling authors to self-publish any

²⁰⁵ On the US market, please see R Deahl, 'For Major Pubs, Will Print no Longer by the Norm?', *4 Publishers Weekly*, October 28, 2013.

work. Domestic examples include *Plumbo*,²⁰⁶ which enables authors to publish their own books in print or e-book form, by offering services as marketing support, printing (or converting into e-book) and distribution bookstores such as *Bol* (a dominant online retailer in the Dutch market) and *Amazon*. This does not necessarily eliminate the role of the traditional publisher. For example, another platform, called '*Brave New Books*',²⁰⁷ is an initiative by *Bol*, *Singel Uitgeverijen* (traditional publisher) and *mijnbestseller.nl*. This platform offers authors, as an extra (paid) service, the possibility to get advice from editors, designers and (famous) writers that are affiliated with the traditional publisher (i.e. *Singel Uitgeverijen*). Authors grant *Brave New Books* a non-exclusive licence to publish the book.

In Denmark, a number of 'alternative' publishing houses have emerged. These 'alternative' publishing houses may be offering better royalties on educational and other academic books than traditional publishing houses, but – on the other hand – may require authors to do more work in terms of proof-reading and language control of the manuscript, etc. The Danish Authors Society, the DFF, also notes that, in the translation industry, a few translators have set up as publishers of their own translations. However, as they explain, this is more a publishing role rather than self-publishing as such, given they still need to secure the rights of the underlying work.

In Germany, authors who have exclusively published works by means of self-publishing are not eligible, as we mentioned above, to become members of the *Federation of German Authors* ('*Verband Deutscher Schriftsteller*')²⁰⁸ or to be registered in the database of authors of the *Friedrich-Bödecker-Kreis*,²⁰⁹ which must be regarded as a significant disadvantage and thus an impeding factor when considering self-publishing options. Nevertheless, in recent years there have been reports of an upswing in the market of self-published works, inter alia facilitated by increased possibilities to produce e-books – even though turnover principally remains founded on printed books.²¹⁰ In late 2014, the *Association of German Book Trade* ('*Börsenverein des Deutschen Buchhandels*') announced that it will account for recent changes in the overall book market situation, thus allowing even very small (self-) publishers to integrate into the structures of the association in the future.²¹¹

According to the representative of the VS, self-publishing remains a niche and will almost invariably fail to yield profit save some very few prominent exceptions.²¹²

In France, the CPI excludes two situations to which ordinary civil law rules apply:

- *Agreements at the author's expense* ('*contrat à compte d'auteur*'), under which the author or her successors in title pay the publisher an agreed remuneration against which the latter manufactures a number of copies of the work in the form of and according to the modes of exploitation specified in the contract, and ensures their publication and dissemination, or ensures digital publication of the book. Such contracts constitute agreements for hire governed by contract, usage and the provisions of Articles 1787 et seq. of the Civil Code.²¹³
- *Agreements at joint expense* ('*contrat de compte à demi*'), under which the author or her successors in title commission a publisher to manufacture a number of copies of the work at her expense or to carry out a digital publication, in the form of and according to the modes of exploitation specified in the agreement, and to ensure their publication and dissemination. In these agreements, the parties share the profits and losses of exploitation

²⁰⁶ See www.plumbo.nl.

²⁰⁷ <http://www.bravenewbooks.nl/>.

²⁰⁸ <http://vs.verdi.de/service/++co++95b25796-c5d4-11e2-854e-525400438ccf>.

²⁰⁹ <http://www.boedecker-kreis.de/Bewerbungen.403.0.html>.

²¹⁰ <http://www.faz.net/aktuell/feuilleton/buecher/trend-zum-selbstverlag-ich-heisst-die-marktmacht-11830607.html>.

²¹¹ Christina Busse, *Wissenswertes für Selbstverlage*, 2014, 16,

http://mvb-online.de/files/mvb_broschuere_wissenswertes_fuer_selbstverlage.pdf.

²¹² Phone interview with VS representative Imre Török, 1 April 2015.

²¹³ [Article L.132-2 CPI](#).

in the agreed proportion. Such agreements constitute a joint undertaking and are governed, subject to the provisions of Articles 1871 et seq. of the Civil Code, by contract and usage.²¹⁴

A book published on the platform *Kindle Direct Publishing*, for example, as long as no payment is required for such publication, would correspond to the second situation.

In the UK, our correspondent stresses how self-published authors are regularly dominating the e-book bestsellers list as well as the sense of community among self-publishing authors and advice and guidance is provided before self-publishing attempts.²¹⁵

In remaining Member States, the self-publishing market is hardly developed (e.g. Hungary) or we have been unable to gather sufficient or idiosyncratic practices (e.g. Spain).

Scientific Publishing

Introduction to Open Access Publishing

Given that there is no generally accepted definition of what is implied by the term 'scientific publishing', we believe it is essential to explain in some detail our premise for the present analysis.

By 'scientific publishing' we will understand academic research output in the fields of Scientific, Technical and Medical ('STM'), Social Sciences and Humanities. For the purposes of this definition, this academic output is normally publicly funded. We, therefore, exclude from our definition areas such as scientific journalism, corporate research or professional (or trade) publishing even if, in some cases, the works might have some similarities. Further some of these excluded areas are likely to be covered by other categories in this study (such as journalists or book authors). Other authors rely primarily on their careers in the private sector. Privately financed scientific research follows different market dynamics and business models and is excluded from legislative measures in the Member States in this respect. In our area of study, as Guibault explains,²¹⁶ it is becoming increasingly difficult to provide (academic) researchers with wide access to high quality peer-reviews scientific material. Reasons are varied but have largely to do with reduced public funding for university research, inelasticity of demand for scientific journals ('must-have content', demand which also includes the commercial sector) and the concentration of the publishing industry.

As a result of the context above described, Open Access initiatives are increasingly influential. Its principles have been enshrined in three declarations: the *Declaration of the Budapest Open Access Initiative* (February 2002), the *Bethesda Statement on Open Access Publishing* (June 2003) and the *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* (October 2003). The term 'Open Access' was first formally defined at a meeting in Budapest in 2001, which would then lead to the aforementioned Declaration, as follows: '*free availability of scientific literature on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited*'.

²¹⁴ [Article L.132-3 CPI](#).

²¹⁵ For example guidance provided by Writers & Artists, available <https://www.writersandartists.co.uk/self-publishing>; More material can be found in the Self-publishing Conference website (<http://www.selfpublishingconference.org.uk/resources/4563100714>)

²¹⁶ L. Guibault, Mr. C.J. Angelopoulos, ed., [Open Content Licensing from Theory to Practice](#), Amsterdam, 2011.

These aims can be achieved either through the creation of new Open Access business models for scientific publishing, known as the '*Golden Road*' or, in their absence, through the establishment of institutional repositories where all scientific and scholarly publications are to remain freely accessible, known as the '*Green Road*'. The *Berlin Recommendation* of 2003 argued that the '*Golden Road*' is the preferred way for the full deployment of the Open Access principles.²¹⁷

Contrary to the traditional publishing model, which operates predominantly following the '*subscriber-pays*' model, Open Access publishers are experimenting with the '*author-pays*' model, as one form of financing. In the '*author-pays*' model, authors or, more usually, their research funders, pay to publish their article in a journal (through a so-called '*article processing charge*' or '*APC*'). After peer-review the articles are published and the journal is disseminated free of charge, primarily via the internet, although sometimes in paper form too. In some cases, the author or funder pays a submission fee in advance of the publication fee, in order to cover the administrative costs of processing her article, whether or not it is accepted for publication. Together with supplemental materials and the open access licensing conditions, the complete version of the work will be made accessible in at least one electronic online archive.

On the other hand, as Guibault further explains, the '*Green Road*' of Open Access is an alternative, albeit indirect, route that produces a comparable end result to that achieved by the '*Golden Road*'. Its focus is on self-archiving, where authors provide open access to their own published articles by making their own e-prints free for all. This Open Access self-archiving is for peer-reviewed research, written solely for research impact, rather than royalty revenue. An article published according to the '*Green Road*', therefore, goes through all the steps of the traditional publishing process. The only difference is that a version of the article is deposited in the institutional repository. This version is available to the public free of charge. Depending on publishers' contractual agreements, the terms and conditions for '*Green Road*' publishing differs.

Whether scientific output is made available subject to restrictions or following the Open Access model, copyright law plays a decisive role in the way it is being disseminated and used by the scientific community.

Country Overview

Across the EU, as opposed to some examples in the science journalism or professional publishing areas, the contractual relationship between authors and publishers in this sector is fundamentally on a freelance basis. Scientific authors generally are employed by universities, research institutes or similar organisations, and conclude agreements with a publisher for each publication. Contractual provisions vary.

In the Netherlands, contracts are negotiated on an individual basis, but publishers apply their own policies concerning the rights they demand from the author. For example, *Wolters Kluwer* has traditionally demanded in its contracts an exclusive licence to exploit the work in all types of media, with the author retaining the right to include the work in a compilation of her own works or to use it in lectures or presentation to the extent that this does not harm *Wolters Kluwer's* interest in exploiting the work. In return for this, the author receives individually agreed remuneration w.²¹⁸ *Kluwer*, also has a *Green Road* policy which enables the author to

²¹⁷ As Guibault notes, this Recommendation states that 'in order to implement the Berlin Declaration institutions should: implement a policy to require their researchers to deposit a copy of all their published articles in an open access repository; and encourage their researchers to publish their research articles in open access journals where a suitable journal exists and provide the support to enable that to happen'.

²¹⁸ Please note also the changes as per the latest legislative developments regarding publicly funded research (art 25fa) including the right to make the publication open access after a limited period of time.

publish the work himself in an institutional repository (of a university or academic institute) after a certain period.²¹⁹ It is subject to several conditions:

- authorisation for such use is requested in writing;
- it concerns a scientific work, not including works that are (also) used as a textbook for commercial practice or as material for education;
- the period covers at least 12 months, or 6 months in the case of articles in journals; and
- the university or academic institute does not exploit the repository on a commercial basis.

Springer Media applies standard terms and conditions for its contracts with authors. It provides that, unless agreed otherwise in writing, the author grants *Springer* the exclusive and continuous licence to exercise each mode of exploitation covered by the copyright.²²⁰ It explicitly includes the right to exploit the work in *print* and in *digital form* and make it available online and offline to third parties, possibly by means of a database.²²¹ It also includes the ancillary rights such as to reproduce whole or a part of the work in compilations.²²² If the author wants to re-use the work himself, whether or not through third parties, she needs the consent of *Springer*, which cooperate to the extent it does not harm *Springer's* interests in the exploitation.²²³

Due to the aforementioned amendment to the initial authors contract law bill (see section on legislative developments), the new Article 25fa to the Aw provides that the author of a '*short scientific work*' for which the research is, in whole or in part, publicly funded may make that work available for free after a '*reasonable time*' after the first publication; the source of the first publication must be announced in a clear manner. The use of the term '*short work*' means that the provision is intended to apply only to articles rather than including books, but it may also include a contribution to conference proceedings.²²⁴ There is no threshold as regards the proportion of the research that is financed with public funds and works made by authors employed by a university or other government funded research institute are considered as (partly) publicly funded.²²⁵

What this provision addresses is the '*Green Road*', as we explained above: the article is first published in the 'traditional' way, i.e. traditional journals not being open access, before being freely accessible. This is in contrast to what is called the '*golden road*': the work is freely available for the public from the beginning.

The *VSNU* (the *Union of Dutch Universities*) negotiates with publishers so-called '*big deals*', which gives the Dutch universities access to the catalogue of the publishers' journals. In these negotiations, *VSNU* is attempting to agree with the publishers on matters of Open Access.²²⁶

A recent development in this respect is the deal reached between the *VSNU* and *Springer* in November 2014. The aim of the agreement is to make research of Dutch universities Open Access to the public large (which also serves to increase publicity of domestic research) and to be sure that Dutch universities only pay once for access to research. This is therefore a way to avoid the '*double dipping*' scenario whereby universities pay twice: as part of the subscription package and again if they want to make a particular piece of research Open Access. As a result, Dutch universities will pay *Springer* an agreed amount that will be construed as an *APC*, not as a subscription fee. The amount of this fee is, however, calculated on the subscription

²¹⁹ <http://auteur.wolterskluwer.nl/kluwer-en-open-access>.

²²⁰ §4 of the Standard Terms and Conditions of Springer (hereafter: TCS), available at: <http://www.bsl.nl/files/2010/01/Standaardpublicatievoorwaarden-voor-bijdragen.pdf>.

²²¹ §5 TCS.

²²² §6 TCS.

²²³ §10 TCS.

²²⁴ *Kamerstukken II* 2014/15, 33308, nr. 11, p. 2.

²²⁵ *Ibid*, p. 2-3.

²²⁶ <http://www.vsnunl/openaccess>.

fee paid by the universities in previous years. It is thus a way to adjust the payment to the actual consumption while, at the same time, allowing Open Access of Dutch research.

In Germany, in general, the common rules of publishing contracts apply to publicly funded research results. However, the 2013 bill concerning orphan works and works out of print introduced the right to secondary publication of scientific works that have been published as part of a project that was at least 50 per cent publicly funded.²²⁷ Thus, Section 38(4) of the UrhG stipulates that an author of such work may publish the work (make it publicly available) one year after the first publication even if the publisher had exclusive exploitation rights. She is obliged to state the source of the first publication and may not exploit the work commercially, which is supposed to promote open access to scientific works. However, the new law was criticised for being too narrowly confined in scope.²²⁸ The rule applies only to publicly funded articles that were initially published in academic periodicals. Articles written by academics within their general work (outside third party funded projects) are not covered. Furthermore, only preprint versions can be re-published by the author.

The draft for a new *Higher Education Act* ('*Hochschulgesetz*') in the federal state of *Baden-Wuerttemberg* provides for an obligation for universities to compel their scientific staff to publish their works pursuant to open access policies one year after the first publication.²²⁹ The proposal is however controversial and met concerns regarding the fundamental freedom to research.²³⁰

As is the case generally across the Member States, our German correspondent explains that there is hardly ever an employment contract in this type of publishing and there is usually no global transfer of exploitation rights. The relevant model contract, *Contractual Provisions for Scientific Publications* ('*Vertragsnormen für wissenschaftliche Verlagswerte*'), was negotiated between the Association of German Book Trade ('*Börsenverein des Deutschen Buchhandels*') and the German Association of Institutions of Higher Education ('*Deutscher Hochschulverband*'). The still applicable version is from 2000.²³¹

However, even if Germany has a model contract, the terms are still very much agreed and specified individually (see Section 2(1) of the model contract). As an example, the contract between authors and the '*Wissenschaftlicher Verlag Berlin*' provides in Section 8 that the author grants the publisher the exclusive right to reproduce and distribute the work. This right explicitly includes the right to electronic distribution. Subsection (b) refers to the right to distribute the work as an e-book.²³²

Apart from the aspects mentioned above, it should be added that self-publishing has started to gain a particular foothold in the scientific and scholarly sector, especially regarding online distribution. However, most authors choose this option for the sake of publication as an end in itself, not necessarily in order to obtain remuneration to any significant degree.²³³

Concerning authors of *scientific books*, there is no consistent practice in regard to remuneration, as the individual subjects and publishing projects are too diversified.²³⁴ However, the authoritative commentary to the model contract clarifies that as a general rule, scientific authors have to participate in a published book's commercial success.²³⁵ As a specific

²²⁷ <http://dip21.bundestag.de/dip21/btd/17/134/1713423.pdf>.

²²⁸ <http://irights.info/artikel/zweitveroeffentlichungsrecht-die-richtung-stimmt-die-details-enttauschen/15422>.

²²⁹ <https://mwk.baden-wuerttemberg.de/de/hochschulen-studium/landeshochschulgesetz/>.

²³⁰ <http://www.faz.net/aktuell/feuilleton/forschung-und-lehre/open-access-droht-wissenschaftlern-der-zwang-zum-selbstverlag-12783786.html>.

²³¹ http://www.boersenverein.de/sixcms/media.php/976/wiss_vertragsnormen.pdf.

²³² http://www.wvberlin.com/fileadmin/downloads/Verlagsvertragsmuster_wvb.pdf.

²³³ http://www.faz.net/aktuell/beruf-chance/campus/self-publishing-13385834-p3.html?printPagedArticle=true#pageIndex_3.

²³⁴ Fromm/Nordemann, § 32 UrhG, at 62.

²³⁵ *Vertragsnormen für wissenschaftliche Vertragswerke*, 20.

feature of such contractual arrangements, it should be noted that if the agreement concerns a work that is not expected to achieve a considerable circulation, printing cost subsidies to be provided by the author remain common practice.²³⁶ For example, the abovementioned contract between authors and the '*Wissenschaftlicher Verlag Berlin*' provides for a remuneration of 10 per cent of the retail price of the book, Section 6(a).²³⁷

The model contract, as well as the other contracts our correspondent has had access to, do not explicitly contemplate the subject of statutory compensation or remuneration rights.

Italy, in the meantime, has already developed open access policies, in line with those in Germany and, more recently, the Netherlands, relative to publicly funded research (at least 50 per cent of the funds)²³⁸ by, inter alia, requiring 'non-profit republishing in institutional or disciplinary electronic archives, according to the same mode, within eighteen months from the first publication for publications of scientific-technical and medical subject and twenty-four months for subject related to humanities and social sciences". Despite these initiatives, Open Access is not a common practice in Italy.

Our French correspondent distinguishes between scientific journals and scientific books and notes that, in France, in the first case, special attention needs to be paid to the possibility that scientific journals are considered to be 'press publications' and can employ journalists; in such a situation, specific legal provisions applicable to the written press will apply. For instance, the last paragraph of Article L132-6 of the CPI provides that works published in newspapers and periodicals of any kind, the remuneration of the author can be in the form of a lump sum. In practice, while most French legal reviews usually pay freelance authors, often strictly scientific journals (e.g. biology, STM journals) do not pay authors, and the publisher is sometimes even paid by the research centre of the author. It should be noted that transfers free of charge are authorised under Article L.122-7 paragraph 1 of the CPI. In fact, articles in scientific journals are either, as our correspondent explains, paid a lump sum usually too low to actually compensate the time spent by the author or are transferred to the publisher free of charge.

Regarding scientific books, the relationship between the author and the publisher is usually based on copyright law. If the author is an employee of the publisher, which has other activities than publishing (e.g. a school), there can be two situations:

- The author is the main contributor and the book is sold for a retail price by unit: the remuneration will be based on copyright law rules, even if the author is at the same time an employee of the publisher.
- The author is not the main contributor and/or the book is not sold for a retail price by unit: the remuneration will often be a lump sum (copyright law) or, if the author is employed by the publisher, the remuneration will often be included in the salary of the author (in principle by paying the author an additional salary for the transfer of rights).

Publishing agreements often provide for the payment of proportional royalties based on the retail price where possible (sale of the book by unit) and, for other types of forms of exploitation, royalties based on the net receipts of the publisher. However, Article L132-6 of the CPI provides that the author's remuneration for the first publication of scientific and technical works may be in the form of a lump sum, subject to the author's formal consent. In any case, the rates of the royalties are often set quite low (often under 5 per cent of the retail price) and without any payment of an advance on royalties. Our French correspondent also notes how researchers or university lecturers from public institutions own the copyright in any publicly funded research results (Article L.131-3-1 CPI).

The state of scientific publishing varies in other Member States. While in Ireland, Open Access policies are still not very common and the government has only recently started discussing

²³⁶ Id.

²³⁷ http://www.wvberlin.com/fileadmin/downloads/Verlagsvertragsmuster_wvb.pdf.

²³⁸ Legislative Decree 8.8.2013 n. 91, modified by Law n. 112/13, in Article 4.

implementation, in the UK some STM publishers now offer hybrid agreements, with open access elements with authors paying to make their work more widely accessible than usual. Notably, in 2012, the report from the National Working Group on Expanding Access to Published Research Findings (the 'Finch Group') was published. The report sets out an encouraging plan to improve open access to scholarly literature and the Research Councils have used the findings of the group to further develop their policies. In order to help the implementation of the policy, the Research Councils introduced a new funding mechanism as from April 2013, a block grant to universities and eligible research organisations to cover the cost of the previously defined 'APC'.

In Denmark, there is no sector specific regulation applicable to academic works in Danish copyright or contract law. The *Committee for Protection of Scientific and Scholarly Works ('UBVA')*²³⁹ has, together with the Danish Authors Society (DFF) and the Danish Publishers Association, drafted a model contract concerning the publishing of scientific and other academic works (2010), including digital usage. The UBVA has also prepared a standard 'licence to publish' for papers in scientific journals, which ensures that the researchers retain a right to make their papers freely available on the internet (Open Access), and a model contract concerning webcast of academic teaching and knowledge dissemination.

A trend observed in Denmark by our respondents is that, recently, some educational institutions have started to require staff to assign copyright (in whole or in part) in their teaching material to the institution (the employer). In order to ensure the legitimate interests of academic teachers in this regard, UBVA has made a number of recommendations about collective and individual agreements/clauses and has also assisted academics in negotiating such agreements/clauses at specific institutions. At one educational institution, the employer and employees have entered into a collective agreement under which employers and employees split revenues from commercial publishing of teaching material 50-50. For many academics represented by UBVA, their terms of employment include no provisions governing copyright in works that they make as part of their employment. Therefore, according to the Danish Copyright Act the copyright for the works created under the employment would pass to the employer but *'only to the extent necessary for the employer's ordinary business.'*

The question of Open Access to research results remains a secondary issue for most researchers, whereas the primary issue is about having research results published in the best scientific (international) journals. Generally, the question of Open Access depends on the individual terms of publishing, and there seems to be no standard practice in this regard.

We have not been able to gather sufficient or relevant evidence of the practices in the remaining Member States.

2.3.2 Print journalists

Journalists typically work as freelancers or under an employment relationship. In the Netherlands, for example, it is not common to work in both capacities and certainly not for the same company (this would result in a *'false self-employment'*). Of course, some employed journalists might write books as freelancers. If the author is covered by a collective agreement, this agreement can regulate the transfer of copyright. Most collective agreements in the areas of daily newspapers (and TV productions) regulate the transfer of copyright in

²³⁹ The Committee for Protection of Scientific and Scholarly Works (UBVA) is a standing committee under the Danish Confederation of Professional Associations (*Akademikerne*). *Akademikerne* is an umbrella organisation for its member organisations that offer services to professional and managerial staff graduated from universities and other higher educational institutions. UBVA handles, *inter alia*, the copyright interests of Danish academics. For further information, please see www.ubva.dk and www.ac.dk.

employment relations, whereas the collective agreements in the area of the public sector are usually silent about that matter.

The *Dutch Association for Journalists* (NVJ) concludes collective agreements with, inter alia, publishers of newspapers, (news) magazines, (free) local papers, etc. on a yearly basis.²⁴⁰ Collective agreements exist for journalists of newspapers, (free) local papers, and for several kinds of magazines (professional, opinions, popular). For freelance journalists, the contracts are concluded between the individual journalists and the media companies/publishers.

The collective agreements mentioned above all contain similar, if not identical, provisions concerning the transfer of copyrights and entitlements to secondary use both by publisher and journalists. The agreements take as a starting point the employers' copyright, based on Article 7 of the Aw, and mention the possibility to conclude a further arrangement regarding the exercise of the copyrights that will vest in the employer (subject to derogating provisions).²⁴¹ The principles laid down in the collective agreements for newspaper and free local paper journalists is that both publisher and journalist need the consent from the other for use of the works for other purposes than for the purposes of the paper (newspaper, magazine etc.) for which the journalist is appointed.²⁴² The publisher may only withhold consent when it would lead to non-compliance to the norms of cooperation to other publicity organisations.

The journalist, for example, may only withhold consent for other use in the following cases:²⁴³

- for reasons of fundamental nature relating to the journalistic nature or direction of the other publicity organisation;
- because the journalist is not offered an equitable remuneration; and
- for free local paper journalists, the collective agreement also allows the journalist to withhold her consent in the case the contents of her work are substantially altered or impaired.²⁴⁴

However, in case the employer offers an equitable remuneration and cannot reasonably know or presume that the journalist will invoke the first of these grounds, she does not need the journalist's prior consent in urgent cases.²⁴⁵

For employed journalists, remuneration is paid out as a salary. This is subject to any additional payments for other uses, as discussed in the previous section.²⁴⁶

The '*NDP Nieuwsmedia*' (trade organisation for Dutch news media) used to unilaterally draft a model agreement for *freelance journalists*. In the 2002 version of the model agreement, journalists did not transfer their right on the works, but granted the publisher the licence to publish the work once-only in the publications, specified in the contract.²⁴⁷ It provides that the publisher requires the author's authorisation for the re-use of the work in other publication than specified in the contract.²⁴⁸

However, respondents have observed that the larger media companies in the Netherlands demand an exclusive licence that is unlimited in time and is broadly defined as to include all current and future modes of exploitation. In some contracts the licence is exclusive for only a

²⁴⁰ <https://www.nvj.nl/wat-wij-doen/arbeidsvoorwaarden/>.

²⁴¹ Article 4.1(2)(i) CAO voor Dagbladjournalisten; Article 12(1) CAO voor Huis-aan-Huisbladjournalisten; Article 26(2)(g) CAO voor Opinieweekbladjournalisten; Article 26(2)(g) CAO voor Publiektijdschriftjournalisten.

²⁴² Art. 8.5(2) CAO voor Dagbladjournalisten; Art. 12(4) CAO voor Huis-aan-Huisbladjournalisten.

²⁴³ Article 8.5(3)(a) CAO voor Dagbladjournalisten; Article 12(5) CAO voor Huis-aan-Huisbladjournalisten.

²⁴⁴ Article 12(5)(b) CAO voor Huis-aan-Huisbladjournalisten.

²⁴⁵ Article 8.5(3)(b) CAO voor Dagbladjournalisten; Article 12(6) CAO voor Huis-aan-Huisbladjournalisten.

²⁴⁶ Article 3(1) NPDvj.

²⁴⁷ Article 2(1) NDP 'Voorbeeldovereenkomst voor Journalisten' (NDPvj).

²⁴⁸ Article 2(2) NDPvj.

certain period (e.g. one year), *unless* agreed otherwise in the commission contract. On the other hand, other respondents claim that the period of exclusivity demanded by the other party is generally limited in time and that the scope of exploitation is sufficiently clear.

Furthermore, the *FLA (FreeLancers Association, part of VSenV)* drafted general terms and conditions that freelance journalists may refer to. These conditions put aside any general terms and conditions applied by the other party.²⁴⁹ According to this document, authors only grant an exclusive licence to the media company/publisher to use the work for publication for which she created it, on Dutch territory, subject to any written stipulations to the contrary.²⁵⁰ Sublicensing is not allowed. Re-use and other uses are not authorised by the author.²⁵¹

According to the so-called *Sanoma Regulation*, as established by one of the largest media outlets in the Netherlands, the remuneration is agreed upon on an individual basis.²⁵²

In general, however, respondents observe a practice of buy-outs: media companies pay a one-time fee to the journalist, which includes the honorarium for the work and the remuneration for the licence. The broad and unlimited licence and the possibility to sub-licence to third parties result in other uses for which the journalist is not remunerated.

Respondents observe that the fees are too low to make a proper living for journalists; it forces them to do commercial jobs, which reduces the time spent in purely journalistic endeavours, affecting the quality of journalism in general. In particular, this is observed with regard to local journalism. Further complaints relate to the lack of competition among media companies. Recent mergers in the country result in a limited (2 to 3) number of media companies that dominate the market. This reduction is considered by some to affect the position of the journalist to negotiate terms and conditions.

Finally, with regard to remuneration rights and compensation arising from exceptions, remuneration, mainly for reprography (distributed by Lira), appears not to be a significant part of the income of freelance journalists. This remuneration is, however, only based on offline use. Some respondents say nonetheless that for authors whose works are often lent, lending rights remuneration may constitute a significant share of the income for the author.

In both common law countries, Ireland and UK, the contractual practice regarding freelance journalists is inconsistent.

The *National Union of Journalists (NUJ)* in the UK offers freelance journalists some advice on the level of fees, though no model contract as such is available. Generally, freelance journalists own what they create, as opposed to employed journalists, who do not generally hold the moral rights of works done in employment (see Moral Rights section).²⁵³

Relevant case law in this area is that of *Nora Beloff v Pressdram Ltd [1972]*. The case involved the employment relationship of a political correspondent, B, who shared in the editorial responsibility of a newspaper owned by O Co. Apart from letters of appointment to its staff given to her by the editor in 1947, she had no written contract of employment. From time to

²⁴⁹ Article 1.1 Algemene Voorwaarden FLA (hereafter: AVFLA).

²⁵⁰ Article 5.2 AVFLA.

²⁵¹ Article 5.4 & 5.5 AVFLA.

²⁵² This remuneration is said to cover: (i) use in paper products produced by *Sanoma* or *Sanoma Corporation* for unlimited time; (ii) use in other media, such as on a website or other digital medium, produced by *Sanoma* or *Sanoma Corporation* for unlimited time (iii) use for promotional purposes by *Sanoma* or *Sanoma Corporation* for unlimited time; (iv) the inclusion in an internally and externally online searchable digital archive for unlimited time; (v) remuneration for other uses is based on the revenue from those other uses, divided according to a ratio agreed upon in the appendix of the agreement: *Sanoma* receives 70 per cent of the revenue and the remaining 30 per cent is divided among the journalist and other right-holders who contributed to the used article (e.g. photographer, model, stylist).

²⁵³ Please revert, e.g. to the presentation of Mike Holderness (NUJ) 2009 <http://media.gn.apc.org/ar/bournemouth.pdf>.

time she broadcast, appeared on television, wrote for other newspapers and had leave to write books, but in effect worked full-time for O Co., receiving a substantial salary from which deductions were made for tax purposes. She wrote an internal memorandum relating to a prominent member of the government, which was 'leaked' to and published *verbatim* by a magazine owned by D in an article attacking B personally in insulting terms. The editor of O Co.'s newspaper purported to assign the copyright in the memorandum to B who sued D for infringement of copyright in the memorandum claiming statutory and exemplary damages. The court held *inter alia* that B's claim failed because i) she was employed by O Co. under a 'contract of service' within Section 4(4) of the *Copyright Act 1956* and so the copyright in the memorandum had vested in O Co. and that the editor had not been shown to have authority to assign it to B; ii) publication of 'leaked' information is not a 'fair dealing' for the purposes of criticism or review within Section 6(2) of the *Copyright Act 1956*.

As our correspondent reports, many publications ask freelance journalists to assign their rights to them. *NUJ* guidelines recommend not assigning rights, as journalists may be able to adapt the story and sell it to more than one newspaper or magazine. Standard practice is that what is sold to an editor or producer is a licence, the journalists' permission to use their work, once, in one territory, in one medium. Publishers and producers often aim to get freelancers to assign rights for no extra money. *NUJ* guidelines highlight that 'assign' equals to 'sell outright'.

In other occasions, publishers may allow journalists to keep copyright in their work, then demand a licence 'to do anything with it, anywhere, forever'. This is considered as 'rights grabs' from the publishers' side who want to put this work on the internet and sell content to database archives. The *NUJ* suggests that journalists should negotiate separate payments for these uses, wherever possible, as they are separate editions with separate income to the publishers. Therefore, the *NUJ* guidelines are clear: 1. Do not assign rights. 2. Ask the editor or producer what they actually want to do with the work. 3. Negotiate a specific payment for each use.²⁵⁴ Also, the *NUJ* strongly recommends that freelance journalists sign a Confirmation of Commission form to make sure that the terms of accepted work are clear.

In Ireland, there is often no written agreement in the case of freelance authors from whom works are commissioned. Sometimes, as our correspondent explains, a simple letter agreeing some form of payment is used. This letter may or may not refer to rights. Where it does refer to rights, it is likely that the publisher will require an assignment of the rights, or a broad exclusive right to publish, online and offline. Both parties, our correspondent continues, often wrongly assume that commissioned works belong to the commissioner whereas the commissioning of the work confers no interest in the copyright and the rights remain with the author.

The *Irish Copyright Licensing Agency*, as reported by our correspondent, notes that newspapers show little legal awareness when dealing with available digital or/and crowdsourced²⁵⁵ material resulting in frequent copyright infringements (in particular, photographic material seems to be frequently re-used). This repeated infringement is generally, however, not litigated and we cannot, therefore, be more detailed about the extent of the infringement.

²⁵⁴ Briefing for NUJ members available from NUJ/CRA available at <http://media.gn.apc.org/c-basics.html>. Moreover, there is a Freelance Fees guide available at <http://www.londonfreelance.org/rates/> as well as the NUJ Code of Practice for commissioning journalists available here <http://www.londonfreelance.org/feesguide/practice.html>.

²⁵⁵ By crowdsourced material we understand that obtained by 'enlisting the services of a large number of people, either paid or unpaid, typically via the Internet' (Oxford Dictionary definition) which means that, in addition, it often becomes difficult to follow the chain of authorship and the existence of legal obligations.

The National Union of Journalists (Irish Branch) (NUJ-I) is, as in the UK, the trade union that represents print journalists, radio and television journalists and photo-journalists. It represents both employees and freelance journalists and has highlighted the following aspects as being the most relevant to its members:

- The Union is restricted by competition law from engaging in any form of collective bargaining. However, it does advise its members what terms to negotiate with publishers.
- When dealing with freelance journalists, publishers regularly seek 'all-rights included' contracts. The NUJ-I advises its members to refuse this and to offer, instead, a licence which provides for one use only, with repeat fees for any re-publication.
- There are no model contracts. Freelance contracts are rarely in any structured form, the terms generally being contained in an email. However the form of licence referred to in the preceding paragraph is standardised and provided to members for use in engaging with publishers.
- Moral rights are largely ignored.
- Where a publisher/broadcaster engages in both offline and online distribution, an email confirming the arrangement may specify the type of distribution covered by the agreement. In the absence of agreement, it may be assumed that the agreement covers all distribution by the publisher. About a decade ago employees received pay rises and freelancers increased payments for the addition of digital distribution. However this no longer occurs.
- Journalists' incomes suffered a steep decline during the economic crisis that started in 2007. They have now steadied, but have not risen.
- Low rates of pay would be the main complaint of journalists.

In Hungary, journalists are also typically freelancers, trade associations and CRMOs do not participate (no model contract exists) and remuneration is generally a flat fee per sheet. Further, it is worth noting that the drawing up of an agreement in writing is not compulsory if the agreement is designed for publication in a daily or periodical.

On the other hand, in Denmark, journalists tend to be employed on a permanent basis. Individual contracts tend to be influenced by collective agreements between employers' associations and labour unions. Many employers who are not covered by collective labour contracts work with model contracts for employees as well as freelancers. In Denmark, if an employment relationship is neither subject to the terms of a collective labour contract or an individual agreement on copyright, the copyright to these works will, to a certain extent, have been transferred to the employer. However, this only applies to those works that the author produces as part of her employment. The employer, as per the law, will only hold the copyright to these works insofar as the employer requires the rights in order to be able to maintain usual business activities. This is derived from legal usage (e.g. Section 53 of the Danish Copyright Act provides that unclear agreements on rights transfer are always interpreted restrictively in favour of the rights holder).

Generally speaking, most collective labour contracts allow the employer to exploit works in every conceivable way in exchange for the salary. If the employer wants to transfer the exploitation rights to a third party, the author will be remunerated with royalties or by way of an either collectively or individually set amount. In addition, the parties have established a further agreement on secondary exploitation according to which, for example, the exploitation rights on certain works can be assigned to third parties. For this, rightholders receive an individual royalty and in certain cases a fixed collective sum. This model is also used by most rights holders in individual employment – and to a certain extent by freelancers (to the extent the legal knowledge and bargaining power allows) – in their various individual contracts. Rightholders rarely relinquish their moral rights in individual contracts. Moral rights are never relinquished in collective agreements.

An excerpt of Section 14 in the collective labour contract between 'Berlingske Media' (major Danish daily) and the DUJ: 'Subsection 1. The right to resell the exploitation right to works

produced as part of a relation of employment are considered transferred to the company in the sense that the company can use these works in all subsidiaries of 'Berlingske Media' and in Infomedia without further compensation to the rights holder. The receiving media must edit and render the material following the guidelines pertaining to the media for which the work was originally produced, cf. Agreement on Further Exploitation of Material Produced Within a Relation of Employment, Section 9, Subsection 2.'

In addition to this agreement, the parties have established a further agreement on secondary exploitation according to which 'Berlingske Media' can exploit the works to a larger extent and assign the exploitation rights to third parties. For this, rightholders receive an individual royalty and, in certain cases, a fixed collective sum.

Finally, it is worth noting how Germany and especially France have very specific regulation regarding print journalists.

In Germany, framework agreements and collective labour agreements are generally negotiated between, on the one side, the two principal unions in the field,²⁵⁶ and the *Federal Association of German Newspaper Publishers* and several regional newspaper publishing organisations, on the other side.²⁵⁷

There is still a significant number of employed journalists in this sector, in particular at newspapers and magazines that are part of bigger publishing groups and/or that have a significant circulation. However, freelancing relationships become more and more prevalent and already dominate in certain subsectors (e.g. culture journalism).

Regarding the scope of rights, in Germany, the clauses concerning copyright and the granting of exploitation rights for journalists at newspapers and at magazines are almost identical (Section 17 of the framework agreement for journalists at daily newspapers, Section 12 of the framework agreement for journalists at magazines).²⁵⁸ Exclusive rights are granted, but normally the journalist reserves secondary exploitation rights and the remuneration rights, which are administered collectively. The journalist also grants the publisher the right to let the rights enumerated be used by third parties by way of transferring the respective exploitation rights domestically and abroad.²⁵⁹

²⁵⁶ These unions are the *German Journalist Union* (DJU), part of ver.di, and the *German Journalist Association* (DJV).

²⁵⁷ *Framework agreement* can be defined as those agreements between the negotiating parties do not concern the actual amount of remuneration for the relevant professional groups but deal with more general questions concerning the contractual relationship between the parties, e.g., the process of hiring or laying off employees. *Collective labour agreement* or *collective bargaining agreement*, is one regulating the terms and conditions of employees in their workplace, their duties and the duties of the employer, in more specific terms than a framework agreement; usually, the amount of remuneration is determined as part of such an agreement.

²⁵⁸ Please see *Manteltarifvertrag für Redakteurinnen und Redakteure an Tageszeitungen* (as of 1st January 2014) (in German) http://www.djv.de/uploads/media/2014-01-01_MTV_TZ.pdf

²⁵⁹ The translated section of the relevant Framework Agreement (*Manteltarifvertrag*) would read as follows:

Section 17 – Copyright 1. Scope of the granting of rights

The editor grants the publisher the exclusive, temporally, territorially, and substantially unrestricted right to exploit the copyrights and related rights pursuant to the Copyright Act from the moment of their formation that he/she has obtained in the course of his/her contractual obligations stemming from the employment (...) The editor reserves his/her secondary exploitation rights and remuneration rights that are administered by collecting societies pursuant to Sections 21, 22, 26, 27, 45a, 49, 52a, 53, 54, 54a Copyright Act. Agreements between publishers, associations of publishers, and collecting societies remain unaffected by this clause. 3. Transfer of exploitation rights by the publisher to third parties. The editor grants the publisher the right to let the rights enumerated in paragraph 1 be used by third parties by way of transferring the respective exploitation rights domestically and abroad.

Concerning freelance journalists, the particular granting of rights will be agreed on in the respective contract. However, the *joint remuneration agreement*²⁶⁰ clarifies in the first sentence of Section 9 (dealing with '*Umfang der Rechteübertragung*' or *scope of transfer of rights*) that remuneration agreed pursuant to Section 3 of the *joint remuneration agreement* will be considered equitable if it includes the granting and use of the exploitation rights enumerated in Section 9 (Clauses 1 to 9). These refer to the rights of reproduction and distribution and the transfer of these to rights to a third party. They also refer to the transferable right to make the work available to the public for the first time for the current electronic edition of the publication, and the right to use the work as part of the publication's archive. These last two rights are non-exclusive but unlimited in time and scope.

Crucial are Clauses 3 and 7(b). The former provides that the right to initially make the work available to the public electronically in the current electronic edition of the respective medium is included in the agreement on equitable remuneration. However, if the publisher intends to make the work available to the public outside of the case covered by Clause 3, then Clause 7(b) provides that the author is eligible to profit participation amounting to 55 per cent.

As regards remuneration for the transfer of exclusive rights, the relevant agreements between journalists and publishers draw distinctions between different groups of journalists, principally between (1) employed journalists on the one hand and freelancers on the other, and (2) journalists at newspapers on the one hand and magazines on the other. There exists a *framework agreement* for journalists at daily newspapers, a *collective labour agreement* for freelance journalists at daily newspapers in positions similar to employed journalists,²⁶¹ a *framework agreement* for journalists at magazines, and a *joint remuneration agreement*²⁶² for full-time freelance journalists at daily newspapers.²⁶³ The main differences are explained below:

For journalists in an employment situation within the scope of the mentioned framework agreements, remuneration for individual works is satisfied by the regular wage in accordance with the respective provisions in the agreements. This includes online and offline exploitation. Indeed, the aforementioned Section 17 of the framework agreement, dealing with copyright, states in its Clause 6 (*provision on remuneration*) that '*the exploitation of the rights in objects granted pursuant to paragraph 1 (including their digital editions), for which the editor works in accordance with her/his employment contract, is effected without remuneration, as well as the*

²⁶⁰ Joint remuneration agreements are defined in Article 36 of the UrhG: '(1) in order to determine whether remuneration is equitable pursuant to Article 32, authors' associations together with associations of users of works or individual users of works shall establish joint remuneration agreements. Joint remuneration agreements shall take account of the circumstances of the respective area of regulation, especially the structure and size of the users. Regulations contained in collective bargaining agreements shall take precedence over joint remuneration agreements. (2) Associations as referred to under paragraph (1) shall be representative, independent and empowered to establish joint remuneration agreements. (3) If the parties have so agreed, proceedings for the establishment of joint remuneration agreements shall be conducted before the arbitration board (Article 36a). Proceedings shall be conducted upon the written request of one of the parties, if 1. the other party does not commence negotiations on joint remuneration agreements within three months of the written request of one of the parties to initiate such negotiations, 2. negotiations on joint remuneration agreements do result in an outcome one year after the written request to initiate such negotiations, or 3. one of the parties declares that the negotiations have irretrievably failed. (4) The arbitration board shall submit to the parties a settlement proposal giving reasons and containing the contents of the joint remuneration agreement. The proposal shall be deemed to have been accepted if the arbitration board does not receive any written objection thereto within three months of the receipt of such proposal.'

²⁶¹ <http://www.djv.de/uploads/media/Verquetungsregeln-Freie.pdf>.

²⁶² http://www.djv.de/uploads/media/2013-08-01_TV_f_arbeitnehmer%C3%A4hnliche_Freie_an_TZ.pdf.

²⁶³ Unlike 'proper' collective labour agreements, remuneration agreements do not regulate professional relationship between the parties in general, but merely the modalities of remuneration.

²⁶³ <http://www.djv.de/uploads/media/Verquetungsregeln-Freie.pdf>.

use of the archive/databases for internal purposes of the publisher, associated companies and cooperating publishers or for personal purposes of third parties.'

Only exploitation exceeding the contractual boundaries must be enumerated individually.

These exploitations exceeding the limits of the contract include the making available to the public in immaterial forms unless the use constitutes advertisement for the publisher. In such cases, remuneration is considered equitable if it amounts to 40 per cent of the net proceeds of the exploitation.

For freelance journalists, remuneration is based on a number of factors. According to the guidelines on contractual conditions and fees for the use of freelance journalist works issued by the *DJV*, remuneration may be based on the number of lines or pages produced, or as lump-sum payment based on hourly, daily, or monthly rates. Lump-sum payment for individual works is not uncommon either. The extent of remuneration depends on the market position of the employer and the perceived significance of the author and/or the individual contribution.²⁶⁴ As mentioned, in 2010 a joint remuneration agreement for full-time freelance journalists at daily newspapers pursuant to Section 36 of the *UrhG* was established. It stipulates fixed rules for remuneration. According to Section 3 of the agreement, the basis of calculation is the number of written lines.²⁶⁵ However, according to the *DJV*, many publishers continue to ignore the binding remuneration rules.²⁶⁶

Furthermore, in relation to freelance journalists, buy-out contracts that are imposed on authors by means of general terms and conditions – hence factually non-negotiable for the weaker party – are still common practice.²⁶⁷ Since the enactment of the reform of German copyright law in 2002, the journalists' unions have filed a number of ultimately successful lawsuits against major publishers in Germany against their practice of using such unfair buy-out terms and conditions.²⁶⁸ The courts decided invariably that the authors have to benefit from every individual exploitation of the work.²⁶⁹

See above, Section 17(1) of the framework agreement for journalists at daily newspapers: 'the editor reserves his/her secondary exploitation rights and remuneration rights that are administered by collecting societies pursuant to Sections 21, 22, 26, 27, 45a, 49, 52a, 53, 54, 54a Copyright Act. Agreements between publishers, associations of publishers, and collecting societies remain unaffected by this clause.'

The joint remuneration agreement for full-time freelance journalists at daily newspapers likewise clarifies in Section 9(8) that the author reserves those remuneration rights.

Moral rights are commonly not waived or assigned. See e.g. Section 17(2) of the framework agreement for journalists at daily newspapers: '*the editor's moral rights concerning her/his contributions remain unaffected, in particular the right to prohibit the distortion or any other derogatory treatment or use which is capable of prejudicing her/his legitimate intellectual or personal interest in the contribution.*' A corresponding clause is also included in the *joint remuneration agreement* for full-time freelance journalists at daily newspapers (Section 9(9)), particularly emphasising the author's right to recognition of authorship.

All in all, our German correspondent argues that, while it may be said that the financial situation remains relatively stable for journalists in employed editing positions at newspapers

²⁶⁴ *Deutscher Journalisten-Verband, Vertragsbedingungen und Honorare 2013*, 5, http://www.djv.de/uploads/media/web_Wissen2_2013.pdf.

²⁶⁵ See the calculation table under Section 3: <http://www.djv.de/uploads/media/Verguetungsregeln-Freie.pdf>.

²⁶⁶ *DJV, Vertragsbedingungen und Honorare 2013*, 6.

²⁶⁷ *Deutsche Journalistinnen- und Journalisten-Union, Buy-out-Verträge stoppen – FairPay für freien Journalismus*, 2012, 6 et seq., <http://bit.ly/19DbGSL>.

²⁶⁸ *Id.* 9 et seq.

²⁶⁹ See e.g. *LG Bochum*, 24 November 2011, I-8 O 277/11.

or magazines, for freelance journalists the overall situation continues to deteriorate. Remuneration is in decline. Moreover, publishers increasingly abstain from hiring editors, instead resorting to assigning freelance authors. While the numbers agreed on in the 2010 joint remuneration agreement for full-time freelance journalists at daily newspapers are considered fair and adequate, many publishers still have not implemented the rules.²⁷⁰

Finally, it might be worth mentioning the existence of two decisions dealing with *photo-journalists*. In one case (*OLG München, 10 October 2013, 6 U 2260/13*), the court decided that the joint remuneration agreement for photo-journalists²⁷¹ is on the side of the author only applicable to *full-time* freelance photo journalists who work for daily newspapers, and on the side of the user only to the publishers of daily newspapers. Therefore, the agreement cannot be invoked in regard to the adequacy of remuneration between a professional photographer who is not a journalist and the publisher of a daily newspaper.²⁷²

Also, in 2012 the *DJU* (ver.di) and *DJV* on the one hand and the publishers' association *BDZV* on the other agreed on a joint remuneration agreement for the publication of photos in daily newspapers.²⁷³ According to the *DJV*, by determining minimum remuneration, the agreement has managed to counter the on-going decline of remuneration for photo-journalists in recent years as a consequence of the restructuring of the media industry.²⁷⁴

In France, the contractual relationship between the author and publisher is usually an employment relationship, since Article L7112-1 of the [Labour Code](#) provides, as we have seen, that any agreement whereby a press undertaking ensures, for payment, the assistance of a professional journalist is deemed to be an employment contract. A certain amount of freelancing agreements seem to be entered into in breach of employment law, in order to pay the journalists in the form of copyright royalties or fees, and avoid the payment of social charges relating to payments in the form of a salary.

The Act of 12 June 2009 created a specific system, set out in Articles L.132-35 to L.132-45 of the CPI, to facilitate exploitation of the journalists' works by newspaper and magazine publishers.

| System of Exploitation of Journalists' Work in France by Publishers | |
|---|---|
| Type | Employed journalists only |
| Transfer | Automatic assignment, exclusive |
| Scope & Remuneration | <u>Exploitation with the 'Press Publication':</u> (a) Within Reference Period: salary (b) After Reference Period: additional remuneration: salary or, normally, royalties |
| | <u>Exploitation within the Group of the Press Publication: allowed</u> , with additional remuneration (normally royalties) |
| | <u>Exploitation within a 3rd party: allowed</u> , prior formal consent of author (reached individually or per collective agreement) with additional remuneration (normally royalties) |

These new rules that apply to journalists were criticised by many scholars and journalists,²⁷⁵ as these rules limited the journalists' rights under copyright law in favour of the publisher. However, concerning the remuneration itself, the unions now have an important role in the

²⁷⁰ Id., 3.

²⁷¹ <http://www.djv.de/startseite/info/beruf-betrieb/bildjournalisten/verquetungsregeln.html>.

²⁷² 46 AfP 60 (2015).

²⁷³ <http://www.djv.de/startseite/info/beruf-betrieb/bildjournalisten/verquetungsregeln.html>.

²⁷⁴ Id.

²⁷⁵ Scholars include Professor Emmanuel DERIEUX (University Panthéon-Assas), *Loi du 12 juin 2009 - Restriction des droits d'auteurs des journalistes*, *Revue Lamy Droit de l'Immatériel* - 2009, No 51 and Professor Christophe CARON, *Les journalistes, face cachée du projet de loi « Création et Internet »*, *Comm. com. électr.* 2009, No 5, p. 1. Journalists include Marie-Anne BOUTOLEAU, *Hadopi contre le droit d'auteur des journalistes*, 30 April 2009, <http://www.acrimed.org/Hadopi-contre-le-droit-d-auteur-des-journalistes> and Boris MANENTI, *Hadopi: l'avenir des journalistes menacé ?*, *L'Obs Média*, 22 September 2009.

negotiation process, in order to negotiate the additional remunerations that were not previously, in practice, paid.

The detailed system for employed journalists explained above might, nevertheless, backfire and encourage the use of agreements by publishers where the traditional rules of copyright law apply instead and which cannot be construed as being employment-like. Examples would be the use of oral contracts and publishers striving to avoid French labour legislation in negotiations with journalists.

In Poland, there is no collective bargaining, no model contracts and no substantial case law. Further, we have not been able to gather sufficient information to be able to establish common practices in the fields of journalism.

Some journalists are employees (and thus have an employment contract). In this case they receive remuneration from the employer and the employer acquires copyright based on the employment contract and the statutory provision covering employees' creations. In this model, it is nevertheless common that a journalist will receive a fixed amount every month and additionally (often significantly more) for published materials (the same applies to television, etc.).

As our Polish correspondent explains, one of the arguable 'pathologies' of the Polish labour market is the extensive use of civil law contracts instead of employment contracts, as this gives certain cost advantages to 'employers' and 'employees' (social security, tax related and other). It is, for example, common practice to set up a one-person business (firm) and provide 'services' that are, in fact, identical to what an employee (under labour law) would do. The media are not free from this. In such a case a journalist must have a contract with the publisher and under this contract the journalist will be usually paid for the work done (e.g. submitted articles). The publisher needs a 'normal' copyright assignment or licence and such contracts often cover all existing fields of use.

In Italy, the journalist can be either '*pubblicista*', which means that the activity is not practised exclusively, or '*professionista*', when the activity is exclusive. As in the other Member States, in both of the activities, the contractual relationship with the publisher can be as an employee or as a freelancer.

As an employee, the contract is negotiated between the trade association representing the publisher and the journalist, and it applies directly to everyone working as a journalist as an employee of the publisher (or broadcaster). In this case, the negotiated labour agreement relates to all of the aspects regarding the profession and secures a minimum wage for the employee which is proportional to the expertise, age etc.

Regarding the remuneration of the journalist employed by the publisher (daily and periodical newspaper, also digital, news agency and press offices, also digital, TV broadcaster), the remuneration is negotiated between the trade organisations through a collective agreement, which provides also regulations related to the execution of the tasks and responsibilities of the employer and the employee.

Any other agreement that infringes the rights recognised in the collective agreement shall be null and void. The economic part of the collective agreement states the monthly minimum remuneration per category of worker. That is, on the top end, we have the editor with the maximum monthly amount (c. 3,000 euro per month). The bottom range, for trainees, is quoted at around 1,300 euro.

As a freelancer, the remuneration is negotiated between the parties and, often, the journalist is the weaker party. The Italian *High Court of Appeal/Court of Cassation (Corte di Cassazione)*²⁷⁶ declared in 2009 that the remuneration of the freelancer should be negotiated

²⁷⁶ Sentence no. 11011 of May, 13th, 2009.

and not imposed by the publisher. In the absence of negotiation, the journalist should be paid on the basis of the professional fees set by the *Journalist Association*. However, in 2009, the *Italian Antitrust Commission* requested the revocation of minimum professional fees while legislative Decree 1/2012 has abolished all professional fees (including the ones related to lawyers, architects etc.) explaining that they shall be replaced by 'parameters' set by law and subsequent regulations. However, while the parameters have been set for other categories, such as lawyers, there are currently none for journalists. As a result, past professional fees may still be used by the judge to determine whether the remuneration of the freelance is fair or not. A recent decision by the *Court of Appeal of L'Aquila*²⁷⁷ confirmed the above ruling in stating that, in absence of agreement between the publisher and the freelance journalist, the fee cannot be determined solely by the publisher. If that is the case, the professional fees apply. So, while the professional fees have been formally revoked, they are still used as a parameter in lack of any regulation of the matter.

To illustrate, these freelance fees (set in 2007) are calculated on the basis of (i) scope (national versus regional), (ii) circulation figures, (iii) digital versus non-digital newspapers, periodicals, TV broadcasters and news agencies. It sets fees for news items (up to 33 euro), articles (up to 171 euro) and services (up to 342 euro). It is worth noting that there is also a section dealing with 'collaboration' work (i.e. *coordinated freelance work*). Here, fees are set per number of months of collaboration (e.g. 'for at least 2 collaborations per month: 2, 178 euro')

We have not been able to gather sufficient information on contractual practices concerning journalists in Spain or Hungary.

2.3.3 Audio-visual journalists

In Germany, negotiations involve *ver.di* as representing both employed and freelance journalists on the one side and the private and public broadcasters on the other. All broadcasters negotiate their own joint remuneration agreements with the union. There is still a significant number of employed journalists in this sector. However, freelancing relationships become more and more prevalent and already dominate in certain subsectors.

Some of the most important public broadcasters agreed with *ver.di* on a pioneering collective bargaining agreement for freelance authors in 2001 ('*Urhebertariffvertrag*'). Crucially, it recognises the developments in online media and makes an attempt to project those. The granting of exploitation rights includes the exclusive use of the work for all purposes of broadcasting, domestic and internationally. The granting is temporally limited to three, five, or seven years, depending on the format (radio/TV/television play).

In general, the mentioned collective bargaining agreement provides for the basic rules on remuneration, the amount of which will be negotiated in each individual case. Further, separate royalty levels should be set for each mode of exploitation, a practice that may be different in other sections of audiovisual journalism, e.g. concerning relationships between both freelance journalists and employees on the one side, and private broadcasters on the other.

Specifically, Section 16.1.3 concerns the use of the work online and provides that in such a case, the use shall be remunerated by an amount of 4.5 per cent of the initial remuneration.

The mentioned collective bargaining agreement also provides for specific remuneration for the use of the work for educational purposes.

The contractual and financial situation for authors in this sector is to a large degree dependent on whether they are freelance or employed, and whether they are working for public or private

²⁷⁷ Sentence of November, 20th, 2014.

broadcasters. Additionally, there are significant regional differences. Thanks principally to a strong influence of the unions, in particular *ver.di*, journalists working for public broadcasters are in a much stronger position compared to their counterparts in the private broadcasting sector, even when they are merely freelancing. The unions still have a considerable influence on the bargaining and negotiating progress concerning employment relationships with private broadcasters. The situation is, thus, considerably dire for freelance journalists working for private broadcasters, remuneration here is generally substantially lower compared to the other sections.

In French law, an audiovisual work (a film, a TV series, a documentary, audio-visual press, etc.) is not a collective work, but a work of collaboration (Article L.113-7 of the CPI). Authorship of an audio-visual work therefore in principle belongs to the natural person or persons who have carried out the intellectual creation of the work. However, the CPI provides for presumptions of transfer in favour of the producers. Article L132-24 of the CPI provides that agreements between the producer and the authors of an audio-visual work, other than the author of a musical composition with or without words, shall entail, unless otherwise stipulated, assignment to the producer of the exclusive exploitation rights in the audio-visual work. The automatic assignment is very broad since it applies to all types of audiovisual works (films, TV series, documentaries, etc.) and since the producer is the assignee of all forms of exploitation (movie theatres, television, DVDs, etc.) for the whole world. Moreover, the *Supreme Court* ruled that the duration of the automatic assignment is for the duration of copyright.²⁷⁸

The parties involved in the negotiations are several.

The employers (television and radio stations) and the journalists (who are considered as authors in the meaning of copyright) negotiate the employment agreement, which will usually deal with the transfer of rights. The parties will negotiate additional copyright assignment agreements if specific exploitations are envisaged.

Certain radio or television channels (private and public) and the unions of journalists have negotiated collective agreements, which contain provisions on the rights of the authors. Such agreements are superior to the individual agreements negotiated individually between the employer and the journalist, if provisions are in contradiction.

The CRMO SCAM negotiates general agreements with the broadcasters, for payments relating to certain forms of exploitation (see below).

The author and producer usually have an employment relationship, in particular since Article L.7112-1 of the Labour Code provides that any agreement (even with a fixed term) whereby an audiovisual press undertaking ensures, for payment, the assistance of a professional journalist is deemed to be an employment contract. However, there are many journalists who work as journalists for radio and TV channels without an employment agreement, either in the framework of a copyright agreement and/or of a service provision agreement.

As stated above, under Article L132-24 CPI the producer (i.e. the employer) enjoys an automatic assignment of the rights in the audio-visual works. This automatic assignment is very broad since it applies to all types of audio-visual works (films, TV series, documentaries, press, etc.) and since the producer is the assignee of all forms of exploitation (television, DVDs, internet, etc.) for the whole world.

²⁷⁸ The automatic assignment does not, however, encompass music, even if the music is written specifically for the audio-visual work, nor the rights to adapt the audio-visual work into a play or into a graphic work, such as a strip cartoon. Moreover, the automatic assignment of rights is subject to the producer and the author entering into a written agreement, which must provide remuneration for each mode of exploitation. This limits the usefulness of the presumption. In practice, in the sector of audio-visual press, producers usually negotiate very broad assignment agreements with the journalists in the employment contracts.

However, Article L132-25 CPI provides that the authors' remuneration is due for each form of exploitation, which means that the employers have to provide for specific remunerations for each type of exploitation. And this has to be done in an agreement: in practice partly in direct agreements with the journalists and partly in collective bargaining agreements negotiated with the unions of journalists.

Nevertheless, some TV channels collective bargaining agreements simply provide for general assignment clauses.

Moreover, the CRMO SCAM negotiates general agreements with the broadcasters, and sometimes manages the agreements entered into between the broadcasters and their journalists, for payments relating to certain forms of exploitation.

However, TV and radio current news are not admitted to SCAM's repertoire, unless there is a specific agreement with certain broadcasters.

(Investigative) reporting and documentaries (which can be created by journalists) are often created in a freelance or copyright relationship. SCAM is in charge of negotiating the fees with the broadcasters and collecting those fees. The authors transfer their rights to this collecting society on a voluntary basis.

Most of the remuneration of the journalists is in the form of a salary. Indeed, the TV and radio current news only rarely give rise to the payment of royalties via CROMOs. Minimum salaries are often negotiated in the framework of collective bargaining agreements negotiated by the unions.

SCAM however negotiates with the broadcasters fees for the broadcasting of (investigative) reporting and documentaries (which can be created by journalists). Depending on the length, type of work and time of broadcasting, the fees can be quite important.

In the course of the study, we have also received feedback from France-based journalists who note the abuse of freelance contracting in situations that would much resemble an employment-based relationship instead.²⁷⁹

The example of the *BBC Freelance Terms of Trade*, which in principle apply to any contributor, is an interesting one. Clause 17.1 of these terms states that '*in consideration of the payment of the Fee, the Freelance hereby assigns and otherwise agrees to assign to the BBC absolutely and with full title guarantee, and warrants that any individual, agent or sub-contractor engaged by the Freelance to assist in providing the Product(s) and/or Services have assigned and/or agreed to assign to the Freelance absolutely and with full title guarantee all IPRs (both existing at the date hereof and in the future) in any Product(s) in all languages throughout the Universe for the full period of such rights (including all rights to renewals and extensions thereof).*' In addition, Clause 17.3 states that '*the Freelance hereby grants the BBC a non-exclusive, royalty free, irrevocable licence to use and sublicense any IPRs in any Product(s) under the Contract which have not, for whatsoever reasons, been assigned under this Clause 17.*'²⁸⁰

In short, freelancers are under pressure to assign all rights (e.g. *Reed-Elsevier, BBC World*) or grant a licence for all future uses (*The Times*) or, at best, license online use for little money (*The Guardian*). Journalists are, therefore, calling for collective solutions, a reinforcement of the authors' right to negotiate, the recognition of moral rights of all authors, especially journalists, and a consistent right to equitable remuneration.²⁸¹

²⁷⁹ Please find more information on French freelance journalists on the website of the French trade union for journalists <http://www.snj.fr/menu-pigistes>.

²⁸⁰ Terms of Trade for the Engagement of Freelances ('BBC Freelance Terms of Trade') available http://downloads.bbc.co.uk/supplying/pdf/freelancers/BBC_Freelance_Terms_of_Trade.pdf?source_url=/supplying/BBC_Freelance_Terms_of_Trade.pdf.

²⁸¹ Presentation of Mike Holderness (NUJ) 2009 <http://media.gn.apc.org/ar/bournemouth.pdf>.

Finally, on the subject of moral rights, we should note that, as per the law, these are not present in UK journalistic pieces, because moral rights do not apply to works that appear in newspapers or magazines, nor to works that report current events.²⁸² More specifically, employed journalists or photographers have no right to be identified as the author of their works published in a newspaper or magazine; moreover, the right to object to derogatory treatment does not apply in relation to the publication in a newspaper, magazine or similar periodical.²⁸³

In Ireland, most radio and television journalists are employees (as opposed to print journalism) and the rights vest in the employer. The terms of freelance contracts depend on the bargaining strength of the journalist. They generally provide for a fee for the first use and repeat fees thereafter. Television and radio works do not generally lend themselves to alternative types of use. Further, the remarks described in Section 2.3.1 (journalists) are also applicable to audiovisual journalists. The *NUJ-I* represents print, audiovisual journalists and photojournalists.

In Denmark, an excerpt from Section 32 of the agreement between the Danish Broadcasting Corporation and the Danish Union of Journalists states that: '*through the relation of employment, the Danish Broadcasting Corporation acquires all rights for radio and television of the programming material produced as part of the employment. Hence, the corporation can freely use this material in broadcast programming, produced by the corporation itself or by other radio or TV organizations, and in any other context authorized by exceptions in the law*'. In addition to this agreement, the parties have established a further agreement on secondary exploitation according to which the corporation can exploit the works to a larger extent and assign the exploitation rights to third parties. For this, rights holders receive a royalty and a fixed collective sum.

In Hungary, though lacking sectorial regulation and model contracts, the *Media Act* contains specific copyright rules but they refer to the used works created by independent creators in public media, not by the journalist.²⁸⁴

As regards Italy, please note the applicability of much of the analysis provided on Italian print journalist. The same fees apply to TV broadcasters as they do to newspapers or news agencies. This is also the case for the Netherlands, where the Dutch Association for Journalists (NVJ) concludes collective agreements with, inter alia, broadcasters on a yearly basis.²⁸⁵

Finally, it is worth noting a court decision in the Netherlands regarding audiovisual authors. The DCA does not contain any provision obliging the publisher – or any licensee or assignee – to publish or exploit the work. Such an obligation might, however, exist on a contractual basis. Parties might have agreed on an *obligation of result* or a *best efforts obligation*.²⁸⁶ Even when there is no explicit provision in the agreement, the other party may have inspired confidence that it will exploit the work,²⁸⁷ thereby creating an obligation to exploit the work.²⁸⁸ Such an obligation may also result from the nature of the contract.²⁸⁹ In *Frenkel v. KRO*, a freelance author agreed with the broadcaster to produce a documentary film suited for broadcasting. The Dutch Supreme Court ruled that the nature of such an agreement, albeit that the

²⁸² The Society of Authors Quick Guide to Copyright and Moral Rights, par.12.

²⁸³ Copinger & Skone James on Copyright (16th edn Sweet & Maxwell 2013).

²⁸⁴ Available case law includes SZJSZT 19/2003, stating that making copies of articles is not a free use in general. Also, SZJSZT 25/2000, which rules that facts and news are out of the scope of copyright protection. Licences cover reproduction, making available and making available rights. Most media providers broadcast via traditional ways and internet (simulcasting), so they shall be licensed for both modes of exploitation.

²⁸⁵ <https://www.nvj.nl/wat-wij-doen/arbeidsvoorwaarden/>.

²⁸⁶ Lenselink 2005, p. 309-10.

²⁸⁷ Hoge Raad 20 May 1994, *NJ* 1995, 691 (*Negende van OMA*), §3.3.

²⁸⁸ Lenselink 2005, p. 309-10.

²⁸⁹ Lenselink 2005, p. 311.

broadcaster did not oblige itself to broadcast the film, does not cease to have effect when the product (the film) is delivered and when the author's honorarium is paid; the interests and rights of both parties, including the freedom of the broadcaster to decide to broadcast the film and the interests and moral rights of the author, remain existent. In deciding whether or not to broadcast the film, the broadcaster may not ignore the author's rights and interest in broadcasting the movie.²⁹⁰ Whether an obligation to publish exists may thus depend on a balancing of interests of both the author and the publishing party. Such an obligation for the publisher is more likely to be assumed when a publisher accepts an author's manuscript than when it rejects a manuscript on reasonable grounds and in good faith and has given the author the opportunity to correct the shortages. Other factors that may have influence are whether the production of the work is subsidised or whether the author has the possibility to revoke her rights and to go to another publisher.²⁹¹

We have not been able to gather information on the practices of the other Member States.

2.3.4 Print translators

The relationship between a translator and a book publisher is often on a freelance basis. In the Netherlands, the model agreement for the publication of translations is similar to that of Dutch literary works. Some important differences exist however, as regards remuneration. First, the translator generally receives an advance payment that corresponds to a certain amount per book. Indeed, generally, 25 per cent of the payment is due at the time of signing the agreement and 75 per cent is due after the delivery of the complete translation, unless the publisher rejects the translation. The payment is based on an agreed translation fee per word and is calculated on a fixed amount of copies. It would appear, however, that the translator is increasingly experiencing tighter conditions – with lower fees and a lack of royalty arrangement (which has in the past been based on the resale price exc. VAT).

Like the model agreement for Dutch literary works, the author (translator) grants the publisher the exclusive licence to publish the work (translation) in the form of a book or e-book in Dutch or to exploit it. It also includes equivalent conditions concerning the specification of licensed exploitation rights, the ancillary rights, and the remuneration rights and collective rights to be transferred to a CRMO. However, in case the publisher is entitled by the original author to exercise the ancillary rights, the translator conforms to this arrangement, unless the author can reasonably arrive at the conclusion that this is prejudicial to her interests. This also applies to the exploitation rights that were not foreseeable at the time of the agreement's conclusion.

In any case, author representatives observe that this model agreement is applied increasingly less in practice or is unilaterally altered by the publisher, against the interest of the translator.

In Germany the relevant model contract for translation contracts from 1992 was negotiated between the *Federation of German Authors* and the *Association of German Book Trade*. The *joint remuneration agreement* pursuant to Section 36 UrhG, came into force on April 1, 2014, and was negotiated between the *Federation of German Authors* and a number of German publishers.²⁹² This recently concluded joint remuneration agreement establishes remuneration for translations as per a basic compensation, based on the number of translated standard pages, Section II (2). Since January 1, 2015, the fee for one standard page is 19.00 euro.

²⁹⁰ Hoge Raad 1 July 1985, NJ 1986, 692 (*Frenkel v. KRO*), §3.1.

²⁹¹ Lenselink 2005, p. 314-316.

²⁹² Among them C. Hanser (Munich), Hanser Berlin and Nagel & Kimche, the *Frankfurter Verlagsanstalt* (Joachim Unseld), the *Hoffmann & Campe Verlag*, Marebuch, the *Schöffling Verlag* and the *Wallstein Verlag*.

Case law: (i) LG Berlin, 27 April 2006, 16 O 806/04 (criteria for the equitable remuneration of translators), (ii) BGH GRUR 2009, 1148 ('*Talking to Addison*' – equitable remuneration), (iii) BGH ZUM 2011, 316 ('*Destructive Emotions*' – equitable remuneration).

In addition to the basic compensation, the translator is eligible for a continuous participation in the turnover of the published works in accordance with Section II (3). The extent of the fee is dependent on the type of publication, with the four categories hardcover, paperback, audiobook, and digital exploitations including e-books. Regarding the latter, the translator's share is 2.5 per cent of each sold copy. Contractual practice however usually provides for certain sale thresholds that need to be reached in order for the turnover participation to be triggered (commonly 5,000 sold hardcover books, 10,000 softcover).

The majority of translators work as freelancers and the latest survey reveals that the abovementioned model contract is the basis of an agreement in 62 per cent of all cases.

Unfortunately, there are still no data on the way this recently concluded joint remuneration agreement has affected, or will affect, the translators' income. From the data available, we can only conclude that remuneration has not been providing any significant income, as revealed by the cited survey.²⁹³ Indeed, the study observed that the translators' situation did not significantly improve following the 2002 reform of copyright law in Germany. The *VdÜ* estimates a median monthly income of around 1,000 euro, which is considered neither fair nor sustainable.²⁹⁴ However, the new rules have only been accepted by a relatively small number of publishers. Especially those with the largest market share have opted to take distance from the agreement. These publishers still pay remuneration below the minimum fee determined by the Federal Court of Justice in 2011. At the same time, a number of smaller publishers occasionally apply the new rules without having formally signed the agreement, according to the *VdÜ*. In this limited sense, the joint remuneration agreement does already set a new standard.

In short, the rules operate in favour of the translators in those – small – parts of the market that have accepted them. Here, the remuneration per page is now stable, and the translators gain a fairer share of the revenue from sold copies. Outside of this part of the market, however, remuneration arguably remains, by and large, inadequate, which still affects the majority of all translating contracts.²⁹⁵

Since 2002, the *VdÜ* has pursued circa 40 actions in accordance with Section 32 of the *UrhG* in order to achieve adjustment of unfair contractual arrangements (though not via class action, which remains not possible legally). This fact might lead us to conclude that unfair practices remain common in the translation market. Indeed, according to representatives of the association, negotiations are largely led by publishers. Complaints about non-adequate remuneration appear to be the rule rather than the exception.²⁹⁶

In France, contracts are negotiated directly between the translator and the publisher or the company commissioning the translation.

A code of usages for translation of a work of general literature, entered into between the *Association of Literary Translation of France* and the national *Trade Union of Publishers (SNE)* on March 17, 2012, gives a guideline for the agreements for translations in literature.

In application of Article R 382-2 of the *Code of Social Security*, the authors of translations of books, pamphlets and other literary and scientific writings, are authors, and are not therefore in an employment relationship. The remuneration is in the form of copyright royalties.

However, the person who translates the texts of a technical and commercial published nature such as brochures, catalogues, flyers, and more generally any translation work for commercial or promotional purposes, are in an employment relationship, even if the contract qualifies the relationship differently.

²⁹³ *Id.*, 2.

²⁹⁴ Information provided by representatives of the *VdÜ* via email.

²⁹⁵ All information provided via email from September 21, 2015.

²⁹⁶ *Id.*

Translators translate different types of texts for different types of uses. The assignment will therefore depend on the uses in question. For example, where a literary book is translated, the following will at least be transferred: the reproduction right and the right to make the work available, including digital and online exploitation on any type of platform. This is common practice, not a presumption established by law.

In the UK, literary translators in the print sector are in a similar situation, as regards contractual practices, to authors of books.²⁹⁷ The *Translators Association*, which represents literary translators' interests, is a branch of the *Society of Authors*.²⁹⁸ The translator has a model contract which grants the publishers 'the exclusive licence to print, publish and sell the Translation in volume form in print/and e-book format/in all forms together with the right to handle the additional rights mentioned in Clause 7 hereof during the period and in the territories granted under the Publishers' exclusive licence for the Work.'²⁹⁹

In Ireland, feedback was provided in relation to *audiovisual translators* as well, by the *Translators and Interpreters' Association of Ireland*. Probably about 95 per cent of the translators in Ireland are freelance. They work for direct clients (companies, solicitors, private persons) or translation companies. As to contracts, translators working for translation companies seem to routinely agree to an all-rights transfer.

Translators working for direct clients are sometimes asked to sign a formal contract depending on the subject matter. But generally speaking, a contract comes about for each translation assignment through the exchange of emails. Amongst translators, the issue of copyright and the attitude to it tends to vary.

In Denmark, as the *DFF* explains regarding for translators in print, the *Danish Publishers Association* decided to terminate the collective standard agreement regarding literary translations in 1991. The former normal contract provided for a standard tariff for translation to be paid as a basic remuneration for the primary usage, with the possibility for a *secondary*

²⁹⁷ At the General Conference of UNESCO (Nairobi, 1976) after 20 years of campaigning by *FIT* ('*Fédération Internationale des Traducteurs*') a Recommendation was adopted which sought to assimilate the status of translators to that of authors. The UK has approved the Recommendation which has considerable force although it is not an international convention.

²⁹⁸ <http://www.societyofauthors.org/translators-association>.

²⁹⁹ Clark's Publishing Agreement, *op.cit.* p.275; See Clause 1, 6 and 7 of model Translator's Agreement Clause 6 deals with *Payment* and states that the Translator is due: '(...) 6.1 In advance and on account of all sums which may become due to the Translator under this Agreement, the sum of [amount] which shall be payable half on signature of this Agreement and the balance on delivery [and acceptance] of the translated text and 6.2 On sales of the Publishers' edition of the Translation in print form at home and abroad the Publishers shall pay to the Translator the following royalties based on the UK recommended retail price/the Publishers' net receipts from sales of the Translation: (i) [number] per cent on the first [number] thousand copies sold; (ii) [number] per cent on copies sold between [number] thousand and [number] thousand; (iii) [number] per cent on all copies sold beyond the first [number] thousand copies. No royalties shall be paid to the Translator on copies of the Translation sold at or below cost, presented by the Publishers free of charge, lost through theft or damage or destroyed by fire, water, in transit or otherwise'.

Clause 7 deals with the Payment on Sale of Other Rights. It reads: 'under their licence of rights for the Work from the Proprietors, the Publishers also control the following rights (include/delete as appropriate) and the Translator hereby grants to the Publishers the exclusive licence to handle such rights during the term of this Agreement and subject to the Publishers paying to the Translator a share of the proceeds from the sale of such rights as specified (...)'. The specification includes a percentage per right, e.g. first serial rights, second serial rights, US rights, book club rights, audio rights or e-book rights licenced to a third party). The Clause further states that 'the licensing of such rights is subject to the Translator's approval/The Translator will be informed of the licensing of such rights and the Publishers will use their best endeavours to ensure that the Translator is prominently credited on the licensed version' and how (i) Public Lending Right (PLR), rental and lending rights, and any other rights not specified above are reserved by the Translator and (ii) The Translation shall be included in the scheme administered by the Copyright Licensing Agency, with the Translator's share of any income from the CLA to be paid to him/her by ALCS.'

(rights) exploitation fee(s) (e.g. book club or paperback version) as 25-50 per cent of the basic remuneration for other usages, i.e. a sort of best-seller mechanism.

The *Literary Translators Group* within the DFF still recommend this model, but as publishers increasingly prefer buy-out contracts with one payment for *all printed and digital usages for all times* henceforth, this should be subject to a proportionately higher one-time payment to correspond with the other model. The *Literary Translators Group* make statistic surveys to monitor the average payments in relation to the former standard tariff, and with reference to this statistics the opinion of the *Literary Translators Group* is, that the payment level for the buy-out model does not adequately remunerate the translators for the extensive transfer of rights when compared with the other model. Basically, publishers pay the same remuneration, only now it includes everything, also digital rights. And generally the level of remuneration for literary translations has not followed the developments in the Danish consumer price index. Again according to the DFF, the translators are increasingly left with just moral rights, devoid of any real commercial significance.

In Spain, the translator, as an author, deserves the full protection for her derivative work as granted by the publishing contract (except for the part of the commissioning of the work, regulated separately).

Typically, therefore the legal relationship is a mixed one, combining elements of a commissioning contract with those of the publishing agreement, regulated in the Spanish law. These two elements are sequential: first a translation service is provided and paid for. If accepted, then the publishing relationship comes into play. Generally, remuneration would be proportional to the results of the work. However, one of the exceptions that Spanish law recognises to the requirement for proportional remuneration is for first editions of translated works, where lump sums are allowed.

The translators association in Spain has different model agreements for print and digital exploitation as they are very keen to prove that the particular characteristics of the digital market deserve a separate contract altogether rather than their description in the context of a mere form of exploitation. These sample contracts have been 'approved' by some publishing houses.

The difference in remuneration between print and digital translations is also noteworthy. Some publishers offer double the share in the case of digital publishing. That is, if the royalty percentage is 1 per cent of the book price, excluding VAT, this amount would increase to 2 per cent in the digital domain. Other publishers, however, offer the same percentage in both cases. The rationale behind the difference lies in the savings incurred in by the publisher (e.g. printing, distribution).

Regarding the advance payment, differences in format do not lead to different amounts.

Spain has ruled that it is an anti-competitive practice for associations to recommend specific tariffs, including any type of collective bargaining. *EIZIE*, a Basque translators' association, has recently been fined by the regional competition authorities for publishing a series of recommended tariffs on its website.³⁰⁰

One of the key challenges encountered by translators, as explained by the translators' association is the lack of information on the level of sales (or third-party licensing, number of editions etc.), that is, the follow up of the contractual agreement.³⁰¹

In any case, translators strive to find extrajudicial agreements given the costs, and time, that goes into judicial proceedings (in addition to the concerns of the translator as regards reputation).

³⁰⁰ Resolución (EXPTE. 1/2012, EZIE-Tarifas Traducción), dated April 7, 2014.

³⁰¹ Informe de la Asesoría Jurídica de ACE Traductores en el año 2014.

Again, as is the case with journalists, in Poland there is no collective bargaining, no model contracts and no substantial case law. As with journalists, translators tend to legally operate as small firms.

We have not been able to gather further insight from the remaining Member States (other than that applicable to translators as per the previous sections, especially where book authors are analysed).

2.3.5 Audiovisual translators

It is common in the countries under study that audiovisual translators are freelancers (e.g. Denmark). In the Netherlands, subtitlers, who tend to work on a commission basis, are represented since 2007 by the *BZO*, an association for self-employed subtitlers. The BZO has indicated that it is fairly common to agree, in exchange of a commission payment, the transfer of exploitation rights and an obligation not to object to alterations in the translation. Generally, no other (future) exploitation modes or ancillary rights are mentioned. In this example, the fee is based on the duration of the film: 4.75 euro per minute. According to our interviewee, it is currently common to pay subtitlers on a minute basis, while it used to be on the basis of the length of the subtitles (which used to result in higher fees). The fee is perceived as relatively low. As in the case of Germany, below, fees are generally one-off (i.e. lump sums), thus excluding the translator from her participation in the potential success of the translated work.

In Germany, except for an occasional and marginal involvement of the *VdÜ*, there are no unions or professional associations on the part of the audio-visual translators, which means that every translator usually negotiates with their employers on their own (however, the '*Untertitelforum*' or *Subtitle Forum*, a loose assembly of audio-visual translators, aims at acquiring the status of a professional association sometime soon, likely under the umbrella of the *VdÜ*). There are no model contracts applicable to the sector. Agencies in Germany usually have a small staff of employed translators.³⁰² Public broadcasters also frequently work with employed translators. However, the vast majority of audio-visual translators are freelancers.³⁰³ The majority of contractual arrangements provide for a global transfer of all rights without any further differentiation. Often, no written clauses exist at all, instead the granting of exploitation rights is agreed on orally and implicitly. Buy-out arrangements dominate the sector. Contracts almost invariably provide for a single remuneration for all forms of exploitation, without provisions concerning online or any other form of subsequent exploitation. Numerous international agencies even go as far as explicitly prohibiting the reporting of works to the *VG Wort* in order to avoid the obligation to make payments to collective bargaining arrangements.

The contractual practice is generally considered unfair, and remuneration insufficient: in recent years, '*Untertitelforum*' has observed a downward spiral concerning the agreed fees for translation, which is mostly a consequence of the entry of international agencies in the market in Germany. These agencies, thanks to their larger size, have achieved economies of scale and are able to push down prices in the German market.

Concerning the transfer of exploitation rights, the absence of clauses on subsequent exploitation of a work, and the dominance of buy-out agreements is also considered unfair.

In the UK, translating in the audio-visual sectors is not yet a profession with recognised representation, but it is treated as a job any translator can do, although it is highly specialised

³⁰² As explained by '*Untertitelforum*'. An example is found here: <http://de.inpuzzle.com/leistungen/audiovisuelle-uebersetzung/>.

³⁰³ Relevant case law is OLG Köln ZUM 2007, 401 (exploitation of a film with both voice over and with subtitled constitute two distinct forms of exploitation).

and requires additional skills. Subtitling is not straightforward translation, but involves editing and rephrasing dialogue succinctly and with linguistic flair.

The *Subtitler's Association* is an organisation formed by professional subtitlers to promote high-quality subtitling, gain professional recognition, promote fair rates and working practices for professional subtitlers and to maintain standards of professionalism within the industry.

According to the *Subtitler's Association*, there is a fierce price war going on among subtitling companies, driven by the major film studios, which appear to have unrealistic expectations with regard to further cutting their costs without affecting quality. This especially affects experienced freelance subtitlers, whose rates are constantly being cut, again, according to the *Association*. As a result, the latter fears that this is leading to many professionals moving away from the business and hence, to a drop in the quality in the subtitling industry.³⁰⁴

We have not been able to gather further information on the remaining Member States (other than that which can be also applicable to translators, such as in the context of book authors).

2.3.6 Photographers

Photographers are typically freelancers and there is little in terms of sectorial regulation.³⁰⁵ Further, in Poland and Hungary,³⁰⁶ contractual practice appears to be particularly inconsistent and we have not been able to gather sufficient information to be able to establish common usage in the field. Again, as is the case with journalists, in Poland there is no collective bargaining, no model contracts and no substantial case law.³⁰⁷ A very similar practice to that explained in the Journalists section, has evolved in the case of photographers, who legally (formally) operate as 'small firms'. In fact, in Germany, approximately 95 per cent of photographers work as freelancers. Professional associations in this sector offer model contracts. However, these are rarely accepted by publishers or other users. Occasionally, there will be framework agreements with individual publishers.

A large German publisher uses a clause in its framework agreement with photographers whereby the photographer grants the publisher the exclusive, territorially, temporally and substantially unrestricted right to exploit all copyright and related rights pursuant to the UrhG. This extends to new modes of exploitation and the transfer by the photographer of the

³⁰⁴ Please note that no model contract was acquired for the relevant sector in order to further evaluate contractual practice. Please revert to the *Manifesto of the Subtitlers' Association (SUBTLE)* http://www.subtitlers.org.uk/ajax.php?modulo=paginas&accion=sitio_ver&idpaginas=3. Please see also PhD thesis by Szu-Yu Kuo, 'Quality in Subtitling, Theory and Professional Reality', 2014 p.223-226. The research indicates that one of the crucial issues that professional subtitlers are mostly concerned with is unreasonably low rates. However, the study has identified that less than a third of the respondents acknowledged to have experienced rate cuts; in fact, there was a small fraction of respondents who were offered higher rates or obtained them through negotiation, but it is not clear if this was the case for UK subtitlers. A number of the respondents were professionals from the UK, *SUBTLE* was involved during the stages of revising the questionnaire structure and refining the questions. For full text, please follow this link:

<https://spiral.imperial.ac.uk:8443/bitstream/10044/1/24171/1/Kuo-SzuYu-2014-PhD-Thesis.pdf>.

³⁰⁵ Except perhaps, as we've seen, the existence in Germany, Italy and Spain of legal protection granted to the non-original photographs under the related rights umbrella.

³⁰⁶ Available case law includes SZJSZT 40/2007 stating that parts of a photo can be protected, Or SZJSZT 3/2010 declaring that photos of a diary shall be protected if they are original and individual.

³⁰⁷ The existing case law does not touch on relevant issues. For instance, a photographer has sued the publisher claiming that her photograph had been used outside the scope of the contract (in advertising, using the cover of the magazine for which the photo had been originally indented). The resulting dispute (resolved by the Supreme Court, Supreme Court (Sąd Najwyższy), March 24, 2011, I CSK 450/10) did not touch upon any sector specific issues, but focused on whether the contract included the required field of exploitation, just as would have been the case in any other copyright dispute of this kind.

remuneration rights, in as far as is permitted by law. The below clause provides an example of a large German publisher in its framework agreement with photographers:

‘(3.) Granting of exploitation rights: (3.1) With the conclusion of this framework agreement, the photographer grants the publisher the exclusive, territorially, temporally and substantially unrestricted right to exploit all copyright and related rights pursuant to the Copyright Act that the photographer obtains or has obtained as part of her assignment for the publisher from the moment of the formation of the right, in relation to all known forms of exploitation and use pursuant to Sections 15 to 23 Copyright Act, including the right of distribution through rental (Section 17(2) Copyright Act). The granting of rights in particular includes the publisher’s right to use and exploit the work in transformed or not transformed form entirely or in part (3.1.1) in printed media of all kind, in particular magazines and books, (3.1.2) on the Internet, in e-books, electronic magazines, online services, in other telecommunications- or data networks of any kind as well as in and from the publisher’s own or other databases, (3.1.3) on picture and/or sound carriers as well as on data carriers of any kind and electronic carrier media of any kind irrespective of the technique of transmission, carrying, and storage, (3.1.4) in press reviews of any kind, (3.1.5) in films, videos, television, broadcasting. The photographer additionally transfers the remuneration rights stemming from her copyright as far as that is permitted by law. (3.2) The granting of rights comprises the use for the purpose of advertisement of any kind and for public relations irrespective of the particular medium. (3.3) The photographer grants the publisher the right to transfer all rights enumerated in Sections 3.1 and 3.2 to a third party or to let them be used by a third party (including by way of licensing). Third parties within the meaning of this clause are companies associated with the publisher pursuant to Section 15 Companies Act (Aktengesetz, AktG) as well as companies not associated with the publisher or any other third party. (3.4) The photographer furthermore grants the publisher the territorially, temporally and substantially unrestricted rights concerning types of exploitation unknown at the time of the individual assignment. In this regard, the publisher has the right to transfer rights concerning unknown types of exploitation to third parties, or have them used by third parties’.

As these forms of buy-outs are the usual contractual arrangements, there will be only one payment for the work (buy-out clause).³⁰⁸ Even remuneration rights are transferred to the extent permitted. Collective bargaining does not play a role within this sector concerning the primary exploitation of a work. According to the assessment of the professional association *FREELENS*, remuneration is not adequate, and the contractual practice is not fair: ‘*some newspapers will pay 5 euro for one printed photograph. No photo-journalist today is able to feed a family. There is no real negotiation process and thus no fairness. There might be up to ten publishers that treat photographers fairly. An adequate remuneration is not existent.*’³⁰⁹

According to *FREELENS* again, the shift to digital has affected the relatively small professional group of photographers disproportionately.³¹⁰ As a result, there has been a constant decline in the amount of remuneration.³¹¹ Only photo-journalists are in a slightly better position, being represented by the trade associations for journalists. In June of 2015, the unions organised a strike of all freelance photographers working for the *German Press Agency* (‘*Deutsche Presseagentur*’, dpa,) in order to end the long-standing freezing of fees, which had led to an effective decline of income.³¹² Inter alia, the *German Journalist Union* (DJU) has therefore

³⁰⁸ Freelens, <http://www.freelens.com/freelens>.

³⁰⁹ Email from FEELENS e.V., Hamburg. Please see also the case law involving photo-journalism in Germany in the Journalism section.

³¹⁰ See <https://dju.verdi.de/ueber-uns/fotografen>.

³¹¹ Email from Lutz Fischermann, FEELENS e.V., Hamburg.

³¹² See <http://meedia.de/2015/06/01/hoehere-verguetung-urlaub-und-spesen-streik-der-freien-dpa-fotografen/>.

urged for an increased unionisation of photographers in order to strengthen their position on the shifting market.³¹³

On the subject of moral rights, it is common practice in this sector to waive the right to recognition of authorship pursuant to Section 13 of the UrhG concerning portrait and advertising photography.³¹⁴ In 2010, the *Higher Regional Court of Hamburg* decided that the right to recognition of authorship may not be waived by means of a clause in general terms and conditions.³¹⁵

In France, where photographers are also generally freelancers, no specific rules apply to them, except for the rules that apply to certain photographers of the written press.

The general rules of copyright law apply, which means that each mode of exploitation authorised or transferred has to be detailed in the agreement entered into with a photographer (Article L131-3 of the CPI) and that the photographer has to be paid a remuneration calculated on the basis of the retail price before tax, if the work is sold by unit to the public, or if a book composed mainly with the photographer's photographs is sold by unit to the public.

However, very often photographs are used to illustrate other works, websites, adverts, etc. Therefore, it will be possible to pay fixed royalties in the form of a lump sum. Indeed, Article L.131-4 paragraph 2 of the CPI states that the author's remuneration can be calculated as a lump sum when the *'nature or condition of exploitation makes the application of the rule of proportional remuneration impossible, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work or because the use of the work is only of an accessory nature in relation to the subject matter exploited'*.

In most situations, the photographer negotiates directly the use of her rights in the framework of a service agreement. The negotiation will depend on the bargaining power of the photographer and will not, therefore, necessarily be fair. The price will depend on the reputation of the photographer. The price will also be set in consideration of the time needed to do the work. It is therefore difficult to assess whether the remuneration is adequate.

As for the use of pre-existent photographs, the photographers find it difficult to negotiate fees for the use of the photographs. And often users exploit photographs with no authorisation. One of the reasons for this is that the French lower courts, and in particular the *High Court of First Instance of Paris*,³¹⁶ very often dismiss the photographers' claims for copyright infringement by refusing copyright protection to photographs; to do so, the courts take into account criteria such as merit and purpose, in breach of the French Supreme Court and the EJC's case law.³¹⁷

It should also be noted that these rights are managed on a voluntary basis by the collecting societies *SAIF* and *ADAGP*, the two main CRMOs responsible for managing photographers' rights. Generally, only the more successful photographers are members of these CRMOs.

ADAGP explains that the amount of fees it collected for authors of still images (including photographs) amounted to EUR 320,000 for 2012. It also explains that no documentation on the works used and the types of uses was provided by the Ministry of Education, although the

³¹³ <https://dju.verdi.de/ueber-uns/fotografen>.

³¹⁴ Fromm/Nordemann, § 13 UrhG, at 15.

³¹⁵ OLG HambUrhG, 1 June 2010, 5 U 113/09 (Heinrich Bauer Achat AG, dealing with the waiving of moral rights in general terms and conditions).

³¹⁶ E.g., the High Court of First Instance of Paris, 30 November 2010, No. 09/04437, ruled that 8,779 photographs of works of art for auction catalogues were not original because *'the photographer was not asked to show any emotion, as it is the object for sale that must be put forward (for the auctions) and not the personality of the author of the photograph'*. The Court of Appeal of Paris (26 June 2013, No. 10/24329, Lamyline) reversed this ruling, taking into account the choices of the photographer, and in particular: the positioning of the objects, the framing, the angles, the use of the shadows and light, the creation of a background, etc.

³¹⁷ [Case C-145/10](#), *Eva-Maria Painer v Standard VerlagsGmbH and Others* (2011) ECR I-00000, para. 91.

agreements expressly provide that such documentation has to be provided and despite the development of a dedicated website for the following sectors: books, press and image (photographs and drawings). The distribution of fees must therefore be made by analogy, in proportion to the rights already collected.³¹⁸

Concerning photographs commissioned in the framework of an advertising agreement, the remuneration system is set out in paragraphs 2 and 3 of Article L.132-31 of the CPI. However, it is extremely complicated and has never really been applied. In practice, the agreements entered into between the advertisement producers and the authors, provide a system of options that the producer may exercise, and a grid with a price for each type of option that may be exercised: prices by territory and by form of exploitation (Internet, press, television, etc.), taking into account the duration. The assignee may pay the author a lump sum, as opposed to a proportional remuneration.

It should be noted that most agreements in France do not mention remuneration rights or compensation.

In the UK, the parties involved are the visual artist and the publisher. Photographs are treated under the CDPA as artistic works, and ownership and duration of copyright in them are, therefore, treated exactly as ownership and duration of other artistic works.

One of the CRMOs involved in the negotiation of contracts for [visual artists](#) in general is the Designs and Artists' Copyright Society (*DACS*). *DACS* is a not-profit visual artists' management organisation that manages four different revenue streams for visual artists on the basis of contractual agreements: (i) Copyright Licensing (following the granting of the exclusive licence to *DACS*), (ii) *Artimage* (an image resource database, based on the non-exclusive licence granted by the author), (iii) Payback (intermediary function, royalty distribution, supplementing copyright licensing through secondary licensing of the rights) and (iv) Artist's Resale Right (ARR). The latter remains outside the scope of this study.

As regards *Copyright Licensing*, *DACS* has individual copyright licences in place for primary reproductions and uses of *DACS*' full rights members. Artists and other right-holders grant an exclusive licence to *DACS* usually in their entire repertoire for all their exclusive rights under copyright law to exploit these through *DACS*' individual and collective licensing activities in all formats. This includes all rights listed in Section 16 of the CDPA for which *DACS* negotiates licence agreements with individual users exploiting specific works by individual members.³¹⁹

Secondly, *Artimage* is closely linked with *Copyright Licensing*. *Artimage* is an image resource where artists and other right-holders can deposit high resolution images of their works with *DACS* which *DACS* will then hire and lend out to parties wanting to reproduce these works. The agreements *DACS* puts in place with artists wanting to join for this activity are non-exclusive licences authorising *DACS* to license the reproductions of works on a similar basis as with the individual copyright licensing covering the exclusive rights in Section 16 of the CDPA.

Finally, *DACS* operates a collective licensing scheme called Payback. Through *Payback*, *DACS* distributes royalties it receives from third parties like the *Copyright Licensing Agency (CLA)*, the *Educational Recording Agency (ERA)*, and cable retransmission schemes in cooperation with the *BBC*, *BBC Worldwide* and the *Irish Music Rights Organisation (IMRO)* amongst others. In the majority of cases *DACS* issues licences to the end user through these third party organisations, meaning that *DACS* as the principal issues collective licences for the photocopying and scanning, but also the educational recording of broadcasts of artistic works and their inclusion in TV programmes subject to cable retransmission services. Payback

³¹⁸ Please see <http://www.adagp.fr/fr/auteur/perception-repartition/usages-pedagogiques>.

³¹⁹ Examples of sector-specific licensing agreements that *DACS* negotiates with copyright licensees can be found on the *DACS* website here: <http://www.dacs.org.uk/licensing-works>. Much of the information provided by *DACS* was based on their written submission to the consultation, dated March 2015.

claimants are asked to grant *DACS* an exclusive licence for the secondary copying of their work to reflect the licences granted to users under the *ERA* and the *CLA* scheme. By doing so *Payback* claimants become *Payback* members as stipulated in *DACS'* Code of Conduct.³²⁰

The *Payback* distribution scheme outlined above appears to be the activity that sits most easily with *DACS'* functions as a collective rights management organisation. However, *DACS* manages copyright or a related right on behalf of more than one right holder which the association believes is for the collective benefit of the relevant group of right holders for all four of *DACS'* activities.

For Copyright Licensing, *DACS* licenses most rights in works by artists they represent and whose works are protected by copyright, as defined under the CDPA. The different remuneration rights licensed include:

- making a copy of the work;
- distributing copies of the work to the public;
- renting or lending copies of the work to the public; and
- communicating copies of the work to the public.

These rights are individually licensed on behalf of their members. The *Payback* scheme supplements Copyright Licensing through secondary licensing of the same rights that are listed above.

In Ireland, the majority of photographers are also freelance and have a limited legal relationship with book publishers. The licensing terms are, according to our correspondent, likely to be succinctly stated in a letter or email and include informal variable arrangements. Indeed, book publishers do not offer formal contracts to photographers. These terms will normally state the mode of publication – i.e. either volume form or e-book/other digital distribution. For example, *'the right to publish the photograph in the publication entitled '...'*. These book publishers have fairly standard rates, which they pay to photographers for the use of a single photograph, usually on the basis that they obtain the right to publish the image in the book. The rate would be in the order of €100 per photograph. It will usually (but not always) specify volume form and digital/e-book. It is unlikely to be limited in time. If the photograph is specially commissioned the arrangement may be set out in more detail and may provide for exclusive use or a buy-out. If the work already exists it will either expressly or impliedly be non-exclusive.

If the image is, however, sourced from a gallery, or an image bank, the cost to the publisher will be higher, but the remuneration for the author will, probably, be less. This is so because the intermediary will receive part of the payment. In the case of educational publications, there will often be a buy-out of rights. The publishers want to control the content in order to issue it in different ways: e.g. to include it in an anthology. The buy-out of rights is the norm in the educational publishing sector. In other sectors a buy-out may occur in the context of a commissioned work, but otherwise would not be the norm.

A photographer may be hired on an hourly or daily rate to conduct a photo-shoot. If a photographer is commissioned to do a photograph for a book cover a special arrangement will be made and the fee will be negotiated. The publisher will probably seek to agree a fee for the purchase of the copyright so that all forms of use can be made – for advertising, trade catalogues etc.

In the case of magazines and newspapers, there is an increasing use of image banks, 'free' material found online and crowdsourced material. When publishers take photographs from freelance photographers, the contract will depend on the bargaining power of the photographer. Some well-known sports photographers have standard contracts, but many

³²⁰ The *Payback* mandate that members are asked to sign can be found here: <http://www.dacs.org.uk/for-artists/payback/membership/terms-and-conditions>.

operate on the basis either of an email or a standard communication from the publisher which confirms authorisation to publish the image. Photographers complain that even when the right to publish is expressed to be for a limited term, and subject to additional payment on republication, the image is often retained in the archive of the publisher and used again without notifying the photographer and without further payment. Photographers who are commissioned by State agencies are usually required to sign all-rights contracts.

There is little distinction made between rights to publish online and offline in the magazine/newspaper sector.

Photographers have active professional associations but little work has been done by them on improving the contractual position of their members.

Portrait photographers and other photographers who accept commissions to produce photographs for individual users have a particular problem in getting their clients to accept licence terms which require additional payments for extra reproductions/additional uses.

If the name of a photographer is on the front cover or title page of a literary work, the photographer is entitled to receive, under the public lending remuneration scheme, a share of the public lending right royalty for the work. Photographers are only gradually becoming aware of this.

We are not aware of any case law concerning photographers in Ireland.

In the Netherlands, Dutch professional photographers are represented by *DuPho* (Dutch Photographers), which has around 1,500 members. *DuPho* was mentioned earlier in this Chapter in the context of sectorial regulation and the Sanoma regulation on commissioned works, which apply to freelance authors in general (that is, they include visual artists as well as photographers). In fact, in the Netherlands, almost all photographers work as freelancers. Employment is not totally absent, but it is uncommon. Self-employed photographers are in a similar situation to self-employed journalists. *DuPho* has drafted general terms and conditions that self-employed photographers can refer to in concluding licence agreements. When referred to, it applies to all offers, confirmations, and oral and written agreements between the photographer and the other party.³²¹ It states that the copyright on the work remains with the photographer and that use by the other party requires prior written consent in the form of a licence, as described by the photographer (in her offer, confirmation of the commission by the other party or the invoice).³²² If this licence does not specify the scope, it is deemed to only include a single use (in original form) by the other party and '*for a purpose, circulation and methods as intended by the parties*' at the time of conclusion of the contract, all in accordance with the photographer's interpretation.³²³ In absence of such statements, the licence is deemed to include what is included in the licence as standard or what necessarily follows from the nature and scope of agreement.³²⁴ Unless agreed otherwise, the other party may not grant sublicences to third parties.³²⁵

However, in practice, complete transfers of copyright are commonly observed. For example, one agreement provides that the copyright is transferred in the broadest legal sense ('*in de meest volledige wettelijke omvang*'), including all entitlements that the law attaches and *will* attach to the copyright. If additional acts will be required for such a transfer by the photographer, the latter is obliged to cooperate on this.

In Spain, the TRLPI grants protection to photographic works as original creations (Article 10 (1) h) but also to mere photographs (Article 128), a distinction in line with that made by the

³²¹ Article 2 of the Algemene Voorwaarden van DuPho (hereafter: AVDuPho).

³²² Articles 14 & 15.1 AVDuPho respectively.

³²³ Article 15.2 AVDuPho.

³²⁴ Article 15.3 AVDuPho.

³²⁵ Article 16 AVDuPho.

German and Italian legislators. The distinction is however not clear. The Supreme Court argues it lies in the existence of some creative relevance that could meet the standard of original creation, which the court accepted as a relative concept. The owner of a '*mere photograph*' has exclusive reproduction, distribution and communication to the public rights (in the same terms as the owner of a photo as creative work). The right lasts for 25 years.³²⁶

In Italy, Article 87 of the LdA distinguishes (i) creative photographic work, (ii) *mere photographs* (protected by a related right) and (iii) photographic reproductions of written documents, business papers, material objects, technical drawings and similar products, which do not receive any protection.

Mere photographs must state the name of the photographer, the date and year of production of the photograph and, where appropriate, also the name of the author of the artwork that is photographed. If the photograph does not show this information, the reproduction of the same is not considered unfair and the fees set out in Articles 91 and 98 of the LdA are not due, unless the photographer proves bad faith.

We have little information in terms of actual contractual agreements outside those that fall in the photo-journalism category (where Journalist Association fees apply to freelance photographers).

Further, we have not been able to gather conclusive evidence in Italy, Germany or Spain on any impact on remuneration arising from the different (legal) types of photographs.

2.3.7 Illustrators

As in the case of photographers, illustrators are also typically freelancers. In the Netherlands, for example, though model agreements exist, illustrators, as well as designers, generally transfer or license their copyrights as a whole, including current and future modes of exploitation (as well as waiving moral rights).³²⁷ Also, a trend has been observed whereby illustrators and designers work as a legal entity and are thus excluded from the contract law applicable to (natural) authors.

The *BNO*, the trade association representing designers and illustrators in the Netherlands, has drafted general terms and conditions that designers/illustrators can refer to. It provides that the copyright (among other intellectual property rights) on the commissioned work is owned by the author,³²⁸ and the transfer – in whole or in part – thereof, and its conditions, need to be in writing.³²⁹ In case there is no transfer or until such transfer, a licence applies for the

³²⁶ For case law please see TS (CivilCh) Westlaw. ES RJ2011/3416. Court of Appeal of BCN denied the qualification as photographic works to some photos published as part of an encyclopaedia despite the '*technical precision*' and the court of appeal of Valencia similarly denied the classification. Others grant the qualification on the basis of '*the choosing of light, angle and frame of the photo*'.

³²⁷ An example is that of *Malmberg*, a publisher of educational books, in its purchase conditions, whereby the author (illustrator, designer, but it could also concern a photographer) transfers her copyright as a whole and where it regards future works she delivers in advance the copyright on the future work, including future exploitation modes. *ThiemeMeulenhoff*, also an educational publisher, requires the similar and also provides for an unlimited licence in case there is agreed on a non-exclusive use by *ThiemeMeulenhoff*. *ThiemeMeulenhoff* also requires by contract the guarantee that the publisher can dispose of the intellectual property rights as if they were transferred according to the agreement, except for the statutory collective rights, rights which cannot be exercised by *ThiemeMeulenhoff* and rights that in general are not exercised by other publishers. The author licenses to the publishers the rights transferred to the CRMO, and if not possible, authorise the publisher to request the CRMO to obtain the rights on behalf of the author. The author is obliged to specify the received remuneration from the CRMO is must pay *ThiemeMeulenhoff* on its request the remuneration received from the CRMO, which is deductible from the author's claims on *ThiemeMeulenhoff*.

³²⁸ Article 4.1 of the General Terms and Condition by the BNO (hereafter: GTCBNO).

³²⁹ Article 4.2 GTCBNO.

commissioning party. This licence includes the right to use the work for the purposes the parties agreed on; the licence is exclusive and limited to these purposes, unless agreed otherwise or otherwise necessarily resulting from the nature and purpose of the agreement.³³⁰ Alterations in the work and/or other (re-)use require written consent from the author.³³¹ With due regard to the commission party's interest, the author retains the right to use for own publicity, acquisition and promotion.³³²

As regards remuneration, the *BNO's* general terms and conditions provide that the author is entitled to an honorarium for carrying out the commissioned work, e.g. in the form of an hourly rate, consultancy-fee, or a fixed fee.³³³ The remuneration for the exploitation of the ancillary rights is set as a percentage of the net revenue from this exploitation, where necessary to be distributed among the multiple authors; the publisher determines each author's share equitably.

The terms and conditions further state that the author may require fair remuneration for her authorisation for alterations in the work or uses other than agreed upon.³³⁴

Some respondents observe, however, that additional remuneration is commonly not possible or is deemed to be included in the initial honorarium. There are few cases in which there are arrangements with regard to additional remuneration for reuse, such as in the case of *Sanoma* (please revert to the Section on Journalists). Respondents further observe that the rare cases in which additional remuneration is agreed, it is rather low. Also distinction between offline and online use would not be made in practice.

In agreements with *G+J Media (National Geographic, Vogue, Quest etc.)*, authors (illustrator, designer, but it could also concern a photographer) grant an exclusive licence to the publisher for a period of six months to publish the work in all publication forms and media that relate to the title for which the work is commissioned for: *'the licence includes the right to use the work on websites and all other products relating to the brand for which the work is commissioned and to store the work in the publisher's databank/archive. These uses are deemed to be included in the honorarium. The agreement explicitly states that use for other titles of G+J Uitgevers and G+J International, including ancillary companies and current and future minority and majority shareholdings is subject to further agreement; the author shall not withhold permission on unreasonable grounds. During the six months, the author may ask the publisher for permission to use the work for other purposes, e.g. promotion, for which G+J will not withhold permission on unreasonable grounds. After these six months, the author may (re)use the work himself or through third parties and if G+J is co-rightholder of the work, permission is required and parties will agree on a fee.'*

In Germany, illustrators are not unionised. They are also generally freelancers, except in the gaming and animation sectors, where employment conditions are more common. The *Illustrators' Organisation (Illustratoren Organisation)* partly asserts union-like functions, representing the artistic, legal, and economic interests of its members. Due to a corresponding mandate, it is entitled to negotiate with employers and their associations on behalf of its members.

There are recommendations for adequate remuneration set up by professional associations in the field, but the particular modalities vary vastly. Examples are payment per hour plus granting of exploitation rights, payment per page or size of illustration plus granting of exploitation rights, lump sum payment plus granting of exploitation rights, profit participation. All modalities will normally in addition be dependent on circulation or sales figures. The

³³⁰ Article 5.1 GTCBNO.

³³¹ Article 5.3 GTCBNO.

³³² Article 5.6 GTCBNO.

³³³ Article 6.1 GTCBNO.

³³⁴ Article 5.3 GTCBNO.

remuneration rights stemming from private or public use of an illustration are being managed by the collecting society *VG Bild-Kunst*. This exploitation is thus in the hands of the author who needs to register her works with the collecting society.

In France, in the framework of publishing agreements, Article L.132-6 of the CPI provides that in the case of library publications, the author's remuneration for the first publication may also be in the form of a lump sum, subject to the author's formal consent, in the case of illustrations for books. Moreover, when the illustrations are used to illustrate other works, websites, or other, with accessory nature, it will be possible to pay the illustrator a lump sum (Article L.131-4 paragraph 2 of the CPI).

There are no other specific rules that apply to illustrators, except for the rules that apply to certain illustrators of the written press. Indeed, illustrators work for many different sectors: written press, fashion, advertising, communication (for which there is a specific automatic assignment), etc.

In the relatively few occasions in which the illustrators do work under employment conditions, however, the illustrator will be paid in the form of a salary, and the minimum wage will often be determined by collective bargaining agreements (e.g. when the illustrator is engaged to create illustrations for advertising or communication promotional material).

Illustrators are sometimes recruited in the framework of a copyright agreement and/or a service agreement, in order to avoid the high social charges attached to the salaries that are paid by the employers. As stated above, if the illustrator is under the subordination of the company she or she is working for, the *Labour Court* or the social security bodies, may re-classify the agreement into an employment agreement. These proceedings are relatively frequent.

In the UK contractual practice, there remains some confusion on the nature of agreements with illustrators. Work arrangements with illustrators are still often done orally and informally, with no clear idea of exactly what rights are being acquired or retained. Under copyright provisions, legal situation should be as follows:

- 1) When an illustration is drawn or painted, copyright automatically exists and is owned by the illustrator, regardless of whether it is commissioned or not.
- 2) If the commissioner wishes to have the copyright, the illustrator has to agree to assign it to the commissioner in writing and signed by the illustrator.

It is not always the case that there is a direct relationship between the publisher and the illustrator. In some branches of publishing, e.g. medical books, a specialist illustrator may well be recruited by a specialist author, and in educational publishing, the publisher may require the overall designer of a book to recruit the illustrators. In these situations it may be appropriate for the publisher to supply the necessary contractual documentation for the purpose of ensuring that the details with respect to ownership of artwork and grant of rights are correct.

For the occasions when there is a direct relationship between the publishers and the artists, a model contract is provided.³³⁵ This contract is not intended for use when the illustrator is to be paid on a royalty basis; in those cases a general book author agreement is more suitable.

Illustrators grant publishers the exclusive right and licence to produce, publish, sell and further to license their artworks or any part of it in any and all forms (including all digital forms) for the legal term of copyright and all extensions, renewals and revivals throughout the world.

The publishers usually pay the illustrator a fee of a certain amount on signature of their agreement, an amount on delivery and approval of roughs of the artwork and an amount on

³³⁵ *Illustration and Artwork Agreement*. a model contract from the book *Clark's Publishing Agreements A Book of Precedents*, ed. by Lynette Owen (8th edn Bloomsbury 2010) p.337.

delivery and approval of the finished artwork. The publishers further pay the illustrator a proportion to be mutually agreed of any net sums received by the publishers in respect of the art-work sublicensed by them to a third party in volume form or in newspapers or magazines etc.

In Ireland, illustrators are also almost always also freelance. There is an active *Association of Illustrators*, which has created standard terms and conditions for the use of works by its members. This is regarded as having had a beneficial effect, in defining the terms of use and clarifying that repeated use requires additional payment.

Illustrators are treated by book publishers and press publishers in much the same way as photographers, receiving a fairly standard rate of payment, per illustration. The contract would normally be a simple written exchange in which the publisher obtains the right (which may be an exclusive right) to publish, subject to payment of the fee.

Moral rights are more likely to be observed in the case of illustrations than in the case of photographs.

If the name of an illustrator is on the front cover or title page of a literary work, the illustrator is entitled to receive a royalty share of the public lending right for the work under the statutory scheme.³³⁶ Illustrators are only gradually becoming aware of this.

In Denmark, contracts for the commission of illustrations for a book and transfer of rights for the publishing of the works, used to be on licensing terms covering specific forms of exploitation defined by the different printed editions of the book, and other secondary uses of the illustrations, for example, posters, postcard and other uses of single illustrations from the commissioned work. The illustrator would keep other reproduction rights and the rights of the original illustration. Generally, the illustrator would receive a payment for the first printed edition and a new payment for every following use that had not been originally intended. Nowadays, most publishers wish to acquire as many rights as possible for a one time fixed fee. This is, in particular, the case in relation to learning materials for the primary school system, where most learning material is now produced only or primarily in digital format. Here, the publishers acquire not only rights to both printed and any digital publishing format, but also often rights to use the illustrations made for one particular work in other works than originally intended. However, according to national illustrators, fees have actually decreased in the last decade, even if a one-time fee for many/all rights ought to be relatively higher than the previous 'specific use' licences.³³⁷

The above would thus lead us to conclude that digitisation has actually worsened the contractual position of illustrators because now publishers, who generally have the bargaining power, tend to demand all-encompassing licences (i.e. present and future uses and modes of exploitation) that the digital format will allow (rather than negotiate further uses, and thus additional fees, as these uses become viable business propositions). Thus, one might argue that both digitisation and the liberalisation of the book market, which have taken place in Denmark in roughly the same period, have, combined, played to the detriment of illustrators (and also authors and translators) in terms of remuneration.

The *DFF*, which also represents illustrators, (as well as authors of books and translators in print) has no model contracts with any publishing companies. It explains that as is also the case with translators, works are commissioned but the contractual relationship is always on

³³⁶ The *Public Lending Remuneration Scheme* was introduced by the *Copyright and Related Rights (Amendment) Act 2007*. It is a scheme for writers, translators, authors, editors, illustrators and photographers who are named on the title page of a book or entitled to a royalty payment from a publisher, and who are citizens of, or domiciled or ordinarily resident in the EEA. Those parties, after registration with the scheme, are entitled to a share in a fund made available on an annual basis from the central exchequer to remunerate them for lending of the books by public libraries.

³³⁷ This trend has been noted by the illustrators with 10+ years of experience and members of DFF.

freelance basis due to tradition, the need for the author to remain independent of the publisher, and maybe also because of the huge expenses and responsibilities related to being an employer in Denmark [see the *author of books* section for more insight, as their feedback is also applicable to illustrators].

Apart from the aforementioned we have not been able to gather additional consistent practices in other Member States.

2.3.8 Designers

As with illustrators, respondents in the Netherlands observe that the tendency to require for designers to transfer all rights is getting stronger. In most countries our correspondents have found few clear differences with illustrators (e.g. in the Netherlands). In Germany, employment seems to be more prevalent (the ratio between designers in employment relationships and freelancers is almost 50/50) and the relevant collective bargaining agreement for designers is applicable to contractual relationships between design companies in Germany, on the one hand, and designers with a position similar to an employment on the other.³³⁸ The contractual practice mostly veers towards lump-sum agreements not based on individual modes of exploitation. In fact, it is uncommon to specify the transferred exploitation rights in contractual agreements, which would hint at a global transfer or rather a granting that needs to be individually interpreted in accordance with Section 31(5) of the UrhG. According to a survey conducted in 2010, only 11 per cent of designers always specify the granted rights, 15 per cent only do it in relation to larger projects, and 37 per cent never do so.³³⁹ It is suggested that this practice is also a consequence of the legal ambiguity concerning the question whether a particular design is actually a work within the scope of Section 2 of the UrhG.³⁴⁰ The collective bargaining agreement merely stipulates in Section 5.4 that the employer obtains the exploitation rights pursuant to Section 31 UrhG on the grant of exploitation rights within the scope of the individual agreement.

Usually, it will be explicitly specified whether the design is planned for online or offline use, as the type of medium is integral for the work of the designer. We lack further information on the actual fluctuations in levels of remuneration depending on the type of medium.

According to Section 7.2 of the *collective bargaining agreement*, remuneration is based on three different elements: conception, grant of exploitation rights, and additional efforts. It clarifies that the remuneration for the granting of exploitation rights is owed irrespective of the question whether the work meets the criteria of Section 2 UrhG on protected works. Remuneration for the conception is calculated on the basis of hourly rate and expenditure of time (Section 7.3). Granting of exploitation rights is calculated on the basis of the extent with regard to intensity of exploitation, degree, and temporal and territorial scope (Section 7.4). No clauses are included in the *collective bargaining agreement* regarding remuneration rights/compensation.

As regards moral rights, the *collective bargaining agreement* stipulates in Section 5.3 that the designer has the right to designate her authorship unless the individual agreement contains a corresponding waiver. Aside from this agreement, the right to recognition of authorship is not yet common practice in this sector.³⁴¹ Pursuant to Section 5.6 of the collective bargaining

³³⁸ Note that the collective bargaining agreement is not considered a joint remuneration agreement pursuant to Section 36 of the UrhG. Case law in this area includes (i) BGH, 13 November 2013, I ZR 143/12 (*'Geburtstagszug'* – threshold of originality concerning design works) and (ii) LG Stuttgart ZUM 2008, 163 (collective bargaining agreement is not a joint remuneration agreement).

³³⁹ Id., 71; see on this question the above mentioned Federal Court of Justice decision, also <http://irights.info/artikel/geburtstagszug-wie-der-bgh-den-design-schutz-erweitert/21243>.

³⁴⁰ See in this regard also the clarification in Section 5.1 of the collective bargaining agreement.

³⁴¹ Fromm/Nordemann, Vor §§ 31 ff. UrhG, at 399.

agreement, there may be no alterations or distortions of the work without the designer's consent.

According to the survey conducted in 2010, a quarter of all designers earns merely about as much as the current unemployment benefits in Germany. Two thirds of designers have a yearly net income of less than 25,000 Euros.³⁴² Also, among freelance designers, it is common to have no more than a few long-term customers for assignments. One third of freelancers has one to three, another third has four to five customers.³⁴³

In France, designers are often freelancers and/or grant authorisations on the basis of a copyright law agreement.

It should be noted that creations made by designers in the framework of a company can be considered as being *collective works* (Article L.113-2 paragraph 3 of the CPI). Where a person or a legal entity takes the initiative of creating and publishing a collective work such as a jewellery or other such works created by designers, the economic and moral rights will vest in that person or corporation (Article L.113-5 of the CPI).

When the designs created are used to integrate other works and therefore have an accessory nature, or are creations that are not sold individually to the public against a retail price (such as websites), it will be possible to pay the designer fixed amounts in the form of a lump sum (Article L.131-4 paragraph 2 of the CPI).

The lump sum will cover the entire assignment of (exclusive exploitation) rights. Indeed, Article L.131-4 paragraph 2 of the CPI is an exception to the legal obligation to pay in the form a proportional remuneration. Therefore, if the author's works are later on exploited separately (e.g. a book which consists solely or mostly of the creations of a designer, which were first created to have an accessory nature), the assignee will have to pay a proportional remuneration. If the initial agreement does not provide for this type of exploitation, a new agreement will have to be negotiated, and the agreement will have to provide for a proportional remuneration. In practice this of course does not happen very often.

It should also be noted that, in France, most agreements do not mention remuneration rights. This would thus, imply that if remuneration rights apply, the author would retain such rights, and will receive a share of the redistribution if he/she is a member of a collecting society and if applicable.

Apart from the aforementioned we have not been able to gather additional consistent practices in other Member States. Please note however, that in some Member States, as mentioned in previous Sections, practice is very similar within the visual artists sector and many of CROMOs represent all (e.g. DACS in the UK) and their description applies to Designers, Illustrators and Photographers alike.

2.4 Corrective mechanisms and obligations

2.4.1 Obligation to publish & non-usus

The new bill amending the Aw does provide for a non-usus provision in the Netherlands. Until that time, however, the Aw did not contain any provision obliging the publisher to publish or exploit the work. In Germany, according to Section 1, sentence 2 of the VerlG, the publishing contract obliges the publisher to publish the author's work. It is the main contractual duty of the publisher to pursue with the economic exploitation as soon as the finished work has been delivered. This obligation is independent of the question whether the agreement comprised a

³⁴² BDG, Umfrage, 2010, 3, <http://wp.bdg-designer.de/wp-content/uploads/2014/10/BDG-Blitzumfrage.pdf>.

³⁴³ Id., 80.

proportional remuneration or a lump sum.³⁴⁴ The obligation does not apply in exceptional cases. The *Federal Court of Justice* has decided that a publisher is not bound in cases where an attempt to exploit an inferior work is not reasonable. However, the burden of proof in this regard lies with the publisher.

The German obligation to publish falls within the scope of the publishing contract, which would exclude the obligation in other types of contractual agreements. Further, it is not yet settled in the academic literature or jurisprudence whether digital works such as e-books or literary works that are published online are subject to publishing contracts within the ambit of Section 1 of the VerlG. Therefore, it is unclear whether the obligation to publish covers works in digital media.

If the publisher violates her obligations to publish and sufficiently exploit the work, the author has the right to terminate the contract pursuant to Sections 32, 30 VerlG. Furthermore, she is entitled to invoke the non-use provision of Section 41(1) of the UrhG as per the above. Thus, she may revoke the exploitation right. The two rights exist independently from each other.³⁴⁵ That is, where no legal or contractual obligation to publish exists, the author can revoke the exploitation right in accordance with Section 41(1) UrhG. The author may also claim compensation in accordance with general contract law pursuant to Sections 280 *et seq.* German Civil Code. Finally, she may terminate the contract for a compelling reason pursuant to Section 314 German Civil Code, as the publishing contract is to be considered one for the performance of a continuing obligation.³⁴⁶

In France, the obligation of the publisher exists as per the conditions, in the form and according to the modes of expression laid down in the contract, and she must complete the publication within the terms customary in the trade, unless agreed otherwise. Article L.132-10 of the CPI provides that '*the publishing contract must specify the minimum number of copies constituting the first printing*', but that '*this requirement does not apply to contracts that provide for minimum royalties guaranteed by the publisher*'.

In copyright assignment agreements, the assignee undertakes to '*endeavour to exploit the assigned right in accordance with trade practice and to pay the author, in the event of adaptation, a remuneration that is proportional to the revenue obtained*'. More specifically, Article L.132-12 of the CPI states that the publisher must ensure continuous and sustained exploitation, and commercial dissemination of the work in accordance with the practices of the trade.

However, in light of the trade practice, these obligations only apply to the publishing of books. Indeed, in other sectors such as the press, communication or advertising, there is no such obligation, and the authors are in any event often paid a lump sum for the assignment of their rights (in the form salary, fees and/or royalties), which means that the author has no direct financial interest in the exploitation of the work.

As regards publishing agreements for printed works, Article L.132-17 of the CPI provides that the author may require termination of the contract if the publisher destroys all the copies of the work. Moreover, the agreement shall terminate automatically if, upon formal notice by the author fixing a reasonable period of time, the publisher has not published the work, or should the work be out of print without having been republished. The work is deemed out of print if two orders for delivery of copies addressed to the publisher have not been met within three months. The termination only concerns the assignment of the relevant exploitations rights.

³⁴⁴ In the model contract agreed between the Association of German Book Trade and the Federation of German Authors from 2014, this duty is reiterated in Section 3(2): 'the publisher is obliged to reproduce, distribute and advertise the work in the form specified in paragraph 1'.

³⁴⁵ OLG München ZUM 2008, 154 *et seq.*

³⁴⁶ Fromm/Nordemann, § 32 VerlG, at 17.

This obligation to continuously exploit is not enforced by representative bodies, but by the authors or heirs themselves. Concerning the publishing in print, there are cases brought court, but not many, as such court cases are difficult and costly. Concerning the publishing in digital form, the new statutory provisions stated above are too recent to give an answer.

In Spain and Italy there's also an obligation to publish and non-usus clause. Both are subject, however, to several caveats. In Spain, the legal obligation to publish applies to print and not to e-books or online distribution. The mention of the term to publish the literary work is mandatory in the contract and cannot exceed 2 years since the author delivers the work (Article 60 of the TRLPI). Further, in Spain, model publishing contracts always have a non-usus clause, recommending a tenor no longer than 18 months. The statutory obligation to publish does help enforcement – generally at a pre-judicial stage (termination or modification of contract).

In Italy, although the obligation to publish exists in the LdA, it is not common in practice that authors invoke this obligation, though it could certainly be enforced by a court should the author sue the publisher. Outside the field of publishing, the non-usus clause is provided in the *usufruct contract*, which is, however, a different type of the agreement in the field of property rights.

In the UK, there is no generally accepted principle that a right granted by a licence may be lost by non-use. However, when a publishing agreement remains completely unperformed, courts may order the publisher to perform the contract, unless this is practically unfeasible.

Publishing agreements may contain provisions on termination, such as *'the Author may terminate this Agreement by summary notice in writing to the Publishers if the Publishers are in material breach of any of the provisions of this Agreement and have failed to remedy such breach...'*

In addition, publishing agreements may contain provisions on reversion of rights, e.g. when the work becomes out of print. For example, *'if this Agreement is terminated by the Publisher [...] all rights granted herein [...] shall revert to the Author without further notice...'*

The publisher's main responsibility under the contract is to publish the work. A legal commitment to publish may arise even out of an informal, verbal contract (*Malcolm v OUP*) and a failure to publish may lead to an action for breach of contract. It is reasonable for authors to seek a written commitment from publishers before signing a contract. Where a firm undertaking to publish is given, a proviso might be included that this shall be unless prevented by circumstances beyond the publishers' control. An important issue may be that the publisher undertakes to publish within a particular time-scale.³⁴⁷

³⁴⁷ Under *Publisher's Obligations*(Schedule III, Section 3), the model Author's Publishing Contract states in 3.1 to 3.4 that *'The Publisher shall, subject to its approval of the finished material, publish the Work at its own expense and in such a form as it considers appropriate (including print on demand) and shall have the final decision over all matters relating to the publication of the Work including the title, paper, printing, binding and jacket or cover, the design, illustration, production, promotion, and advertising of the Work, the number and distribution of free copies, the print number, price, distribution and terms of sale of the Work and any of subsequent edition or impression.*

Notwithstanding Clause 4.1, the Publisher shall be under no obligation to publish the Work if in the Publisher's opinion circumstances beyond the Publisher's reasonable control and not reasonably foreseeable at the date of the Agreement such as (but not limited to) changes in market demand would result in publication being uneconomic for the Publisher in which case the Publisher shall notify the Author in writing specifying the circumstances which render publication uneconomic and terminating this Agreement.

All materials supplied by the Author shall be returned to the Author if the Author so requests in writing provided that they are no longer required by the Publisher. If the Author has not requested the return of any materials supplied by the Author within 6 months after publication of the Work then the Publisher shall have the right to dispose of the said materials as the

The publisher's obligations cover all modes of exploitation, including digital exploitation, but it is preferable to include a relevant express provision in the contract.

Similarly, there is no legal obligation to publish in Ireland. In practice, most contracts specify the obligations to publish. It was traditionally provided in book contracts that if the publisher allows the work to become 'out of print' for a period, the author may call on the publisher to reprint and if the publisher does not reprint within a defined period, the rights granted to the publisher revert to the author. A grey area then emerged as to the meaning of 'out of print', in particular in an e-book context. One leading publisher defined this as meaning less than 30 sales in a year and this solution seems to have gained a good deal of favour. Authors occasionally seek a reversion of rights because of failure to keep a work 'in print'. It is not an obligation enforced by representative bodies although they may advise authors on their rights. If the obligation to publish is stated expressly or can be implied as a term of the contract, the remedy would be either an action for breach of contract or for the author to seek a reversion of the rights in accordance with its terms. If the publisher has failed to publish and the author seeks to have the work published elsewhere, the second publisher may simply clear the matter with the first publisher.

In Poland, there is no general obligation to publish in the law. However, general rules of interpretation may lead to the conclusion that in certain circumstances (e.g. royalty-based remuneration) there is an implicit obligation to publish. There are no model contracts but contractual obligations to publish are not wholly uncommon. On the contrary, rules on non-use appear in its Copyright Act (Article 57), whereby termination and ultimately damages are due if there's no publication within the stated period or 2 years from acceptance of the work. It should be noted however that this provision requires that a contract contains the obligation to exploit and publish the work. It is possible to argue that this does not need be always an express obligation, but certainly cannot be presumed in all contracts either. Article 56(1) allows the author to terminate or rescind for reasons of 'important artistic interests' - this phrase has not been defined but usually refers to the sphere of moral rights. It is possible to argue that non-use may in some cases harm the author's artistic interests and thus be a cause of termination but again this is not an automatic conclusion.

In Hungary, Article 56(1) of the Hungarian Copyright Act gives publishers the right to publish; however, Article 51 contains rules on non-use, applicable across areas. The author can exercise termination due to non-usus after, at least 2 years from the exclusive licence agreement or according to the contractual provision. The author's right to terminate based on non-usus cannot be waived upon signing, '*such a waiver may be excluded by agreement only for a 5 year period following the conclusion of the agreement or, if it occurs later, following the delivery of the work*'. Also, instead of the termination of the agreement, the author may terminate the exclusivity of the licence while proportionally reducing the fee to be paid to him for the use.

In Denmark, though the obligation to publish exists, some professional associations such as the UBVA are not aware that academic authors often invoke the obligation to publish/exploit the assigned rights.

As regards journalists, the *Journalists' Union (DUJ)* explains that agreements rarely require the acquirer to exploit the works.³⁴⁸

Publisher wishes.

The Publisher shall not be responsible for any loss or damage (howsoever arising) to the Work, its illustrations and other related material while it is in the Publisher's custody or in the course of production or in transit or otherwise.

³⁴⁸ Even if Section 54 of the copyright law stipulates: 'the acquirer is obligated to use the transferred rights. The rights holder can terminate the agreement with six months' notice, if the exploitation has not been initiated within three years from the time of the rights holder's fulfilment of the terms of

2.4.2 Existence of best-seller clauses or similar corrective mechanisms

The copyright acts of five of the Member States expressly allow authors to ask for a modification of the contract if the remuneration agreed upon is not proportionate to the income generated from the use of the work (Germany, France, Hungary, Poland, and Spain). This is sometimes referred to as the '*best-seller clause*'. The conditions under which this right may be invoked differ per country.

Such a revision is generally permitted only if the author or performer received a lump sum. In Spain, Article 47 of the TRLPI allows the revision of the contract within ten years of the transfer/licence of rights in exchange for a lump-sum. The law does not dwell in the fairness of the price itself and just focuses on the occurrence of '*manifested disproportion*' with respect to the profits obtained by the transferee/licensee after execution. The author must request its revision (it is not automatic, it is an action); if no agreement is reached she can ask the courts to set '*equitable remuneration*' (the courts have, in that respect, freedom to decide what is considered '*equitable*').³⁴⁹ In principle, this right also extends to employment contracts.³⁵⁰ Given the lack of significant case law regarding Article 47, our correspondent assumes that most disputes, if these exist, are settled extra-judicially.

French law is similar to the Spanish provision, but art L.131-5 of the CPI is more specific in the calculation of the pecuniary harm. Article L.131-5 of the CPI grants a best-seller clause. It should be noted however that the method of remuneration cannot be replaced, just the lump sum has to be modified accordingly. Concerning situations in which the author is paid royalties, the author will be automatically associated to the success of the book (or other). Moreover, many agreements provide that the rate increases from a certain number of copies sold.

Concerning situations in which the author is paid a lump sum as opposed to royalties, if the exploitation of the work is financially more successful than envisaged, Article L.131-5 of the CPI allows the author to claim for the initial lump sum to be revised. If the exploitation right has been assigned and the author suffers a prejudice of more than seven-twelfths, as a result of a burdensome contract or of an insufficient advance estimate of the proceeds from the work, the author may demand a review of the price conditions under the contract. It is possible to assess the prejudice suffered by reference to the practices of the sector.

Other countries, such as Poland, do not expressly state that the best-seller clause is limited to cases where rights have been transferred in exchange for a lump sum. Article 44 of the PrAut states that '*in the event of a gross discrepancy between the remuneration of the author and the benefits of the acquirer of author's economic rights or the licensee, the author may request that the court should duly increase her remuneration.*' Certainly, though, this situation should be more likely to occur in the case of lump sum remuneration (if it is a percentage of revenues, higher revenues will automatically increase the remuneration). In addition, this right may be granted only by the court and the disproportion has to be very substantial. According to our correspondent, however, the norm has little practical significance, amongst others, because of the difficulty in distinguishing between a '*normal*' and a '*gross*' disproportion.

As with most other Member State legislation, Polish general civil law does recognise the doctrine of *rebus sic stantibus* but it is hard to imagine its application to copyright contracts (Article 357 (1) of the PrAut). For example, the clause talks of '*damage*' to one of the parties

the agreement. This does not apply, however, if the exploitation is initiated before the expiration of the notice.' This section applies to all types of work and all types of rights transfer.

³⁴⁹ See, for instance, Sent. Audiencia Provincial de Santa Cruz de Tenerife, número 337/2008, de 27 de junio, FD 3º.

³⁵⁰ See TS (Civil Chamber) March 29, 2001 [Práctica Contable y de Auditoría] Westlaw. ES RJ2002/10216: it revised the remuneration agreed under an employment contract because it was disproportionate to the extraordinary benefits generated by the creation of the employee.

but in copyright the issue would be the publisher's high profits and resulting unfairness. This excessive unfairness could even lead to nullity (contrary to good morals) but this line of thought is not really significant in practice. Also, the unfairness would have to exist at the moment the contract is concluded.

In Hungary, the Hungarian Copyright Act contains a best-seller clause though no strict calculation is specified and vaguely refers to the author's interest in having a '*proportional share in line with the general provisions of civil law and the court may amend the licence terms*'. Unfortunately, there is no case law yet on the subject. There are similar rules in general contract law (Article 6:98). However, given the new civil code only entered into force in March 2014, there is no case law either.

In Germany, pursuant to Section 32a of the UrhG, where the author has granted an exploitation right to another party on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement which grants the author further equitable participation appropriate to the circumstances. It shall be irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained. This revision mechanism, in force since 2002, is less demanding in regard to the degree of disproportion between the result in the agreed remuneration and the proceeds and benefits derived from the exploitation compared to the former Section 36 of the UrhG. In this sense, it is more appropriate to speak of a fairness provision rather than a proper best-seller clause. The old rule is still applicable to cases from before that date. The old rule remains applicable to cases from before March 28, 2002. Section 32a of the UrhG is to be distinguished from Section 32 in the way that the former provision is applicable to cases where an agreed remuneration turns out as inadequate in hindsight.

Pursuant to Section 32a(4), the author shall not have a right as per Section 32a(1) if the remuneration has been determined in accordance with a joint remuneration agreement in accordance with Section 36 of the UrhG (on joint remuneration agreements) or in a collective agreement and explicitly provides for a further equitable participation in cases under paragraph 1. In this sense, the joint remuneration rules for authors of fictional works in German include a corresponding rule Section 3(5). Here, it is provided that in the case of a big commercial success, the publishing contract will link the originally agreed remuneration to an increasing remuneration scale.

As with the non-usus clause, it's only since the passing of new *Authors' Contract Bill* that best-seller clauses have been introduced in the Aw of the Netherlands.³⁵¹

In Denmark, Section 36 of the Danish Contract Act, stipulates that an agreement can be modified or disregarded, partially or entirely, if it would be unequitable or in violation of fair practice and conduct to enforce it.

Further, the model publishing contract drafted by *UBVA*, the *DFF* and the *Danish Publishers Association* includes an option for a best-seller clause (including for academic writing). However, in practice, there are only a few individual contracts and collective agreements that contain a best-seller clause.

³⁵¹ Earlier, it was general contract law that used to provide the legal reasoning to be invoked in such circumstances, although the threshold for this provision to apply is high. Article 6:258 of the Dutch Civil Code provides that an agreement may be terminated as a whole or in part in case of unforeseen circumstances and when continuation of the contract is unacceptable according to the principles of reasonableness and fairness. However, it may be argued that the uncertainty regarding future success of the exploitation of the work is taken into account in the agreement. Whether invoking this provision is successful, thus depends on the extent to which such certainties are taken into account when concluding the agreement.

2.5 Unfair clauses

Some of the associations that represent the authors under study have informed us of the most common complaints among their members regarding what they perceive to be unfair contractual clauses.³⁵² The below lines are, therefore, based on a sample of contractual practices presented to us by these associations.³⁵³ Of all the samples collected we have focused on those we believe are the most relevant complaints in the context of our study. In other words, those that are commonplace and have a clear impact on the remuneration of the authors under study. We will not dwell on policy issues derived from considerations such as whether the industries should be partly subsidised by the state or not.

It is worth noting that, in some instances, we have read contractual provisions where some clauses imposed by publishers are very likely to be considered in bad faith or legally invalid. In these cases, once the contract comes into force, the authors can seek judicial redress, though we understand that this is not always in the interest (or affordable) of all parties. Additionally, what appears to be a common grievance across sectors and countries is the vague and overtly broad terminology of the contracts with publishers. This lack of specification is already a source of invalidity in some countries. In others, where the freedom of contract is the ruling principle, it leads to unfair practices by the publisher. Finally, in other cases, the indubitable severity of other clauses, while being meaningful, would need to be assessed in the context of broader (legal or contractual) relationship between the parties, something we do not have access to.

We also understand that, in some cases, associations are actively calling for the inclusion of intellectual property contracts under current unfair terms legislation, which typically falls under consumer protection measures. There are indeed similarities as sometimes the bargaining power of an author is too insignificant to reject *'take it or leave it'* contracts imposed by publishers, not unlike adhesion contracts forced on consumers.³⁵⁴ In this context, however, it is not sufficient to look at the measures adopted by consumer law. We should also emphasise the very relevant role that should be played by associations and CROMOs in negotiating model contracts, informing authors and sharing of best and worst practices. The latter, however, appears not to be always possible due to non-disclosure requirements in contracts.

Looking specifically at examples that we have selected as potentially relevant to the formulation of any policy recommendation, we encounter the overwhelming majority of complaints dealing with the aforementioned vague or overtly broad provisions. Associations in Member States such as the Netherlands, France, UK, Spain, Germany or Ireland have confirmed this is indeed a common feature of publishing contracts. Indeed, the complaint cuts across sectors and countries. It generally relates to the subject matter of the transfer, which is drafted as an all-inclusive, buy-out of rights. In those Member States that have a legal obligation to specify the scope and duration of the transfer, the publisher uses the freedom of contract to impose alternative, more onerous, clauses on the author.

³⁵² The majority of the comments come from relevant samples provided by associations. It is thus, not an exhaustive country-by-country review. In some instances, specific provisions have also been highlighted by our correspondents. It should also be noted that in some cases we haven't had access to full contracts or an overview of the contractual relationship between the parties.

³⁵³ We have been actively approached, notably between October and November 2015, by the European Writers' Council (EWC), the European Federation of Journalists (EFJ), the European Council of Literary Translators' Associations (CEATL) and the European Visual Artists (EVA) as EU institutions. Further, some domestic associations have also submitted samples of what they perceive as unfair clauses. We name these associations in the main body of the text.

The Value of Writers' Works, Proceedings of the European Writers' Council 2014 Authors' Rights Conference, Brussels, 3 November 2014. The European Parliament.

³⁵⁴ In France, the CPE, *'Conseil Permanent des Écrivains'*, notes that the typical publishing agreement submitted to French authors for their signature is (at least for 95 per cent of its content) a simple subscription form which clauses are mainly written by publishers.

Please see below the contractual areas which authors experience as comprising most of the unfair terms. We have decided to group the different categories of authors under each section as some of these unfair clauses, especially where it regards the scope and the vagueness of the transfer, seem to be recurrent.

2.5.1 Scope of transfer

In Spain, the scope of the *publishing contract* often extends to present and future modes of exploitation (and often without further specification). For instance, relevant associations mention how some publishers retain all translation rights, regardless of whether the publisher has intention or not to publish in other languages. In some cases it is done under the presumption that it is useful to have rights over all uses, as this could prove useful to market the work. In other cases, the intention might be to prevent exploitation in other languages. Finally, in other instances, extending the scope of transfer to all rights without any commercial consideration might respond to mere convenience, that is, imposing *'catch all'* language at little extra financial investment is a safe bet.

Another consequence of this vagueness in dealing with the scope of uses involved in a transfer of rights is the imposition of *ad-hoc* distinctions between *principal* and *subsidiary* rights, which might delude the author into thinking, erroneously, that whatever is included under subsidiary rights is indeed residual. For instance, a sample presented to us includes the right of adaptation (for theatre or cinema) as subsidiary. Again, in some other instances, the publisher appears to be driven by a *'just-in-case'* rationale rather by a thought-out commercial decision.

In Denmark, *literary translators* denounce the regular practice of lump-sum commission payments, often including unknown modes of exploitation and excluding any participation in the success of the work or the ability to recoup the rights. In essence, explains the Danish representative, when it comes to actual exploitation of the work, translators retain their moral rights, if at all. Of course, in the context of contractual negotiation, the use of lump-sum payments in exchange for the transfer of a specific set of rights cannot be considered unfair *per se*. What translators denounce in this case is the very specific course of events in Denmark whereby a lack of collective agreements³⁵⁵ combined with lump-sum payments have greatly curtailed the ability of Danish translators to negotiate with publishers, because they are deprived of any benchmark on the scope or the tenor of the negotiated rights.³⁵⁶

In Italy, translators also complain that, in those cases where a formal contract is negotiated, which is not always the case (*Skype* or the telephone are regular alternatives to the formal contract; underlying rights are not discussed here) that publishers use *'work-for-hire'*, US-inspired contracts instead of regulated publishing contracts, leading to (i) a lack of transparency on the ownership of rights and (ii) the regular waiving of moral rights, which is not allowed in Italy.³⁵⁷ In fact, translators explain that it is a standard practice, and that

³⁵⁵ Publishers decided to put an end to in the early 1990s, as we explained earlier. Further, we are informed that authors' unions are not allowed to negotiate standard contracts with the trade unions of Danish Publishers as per Danish Competition Authorities.

³⁵⁶ Danish translators call for a right to publish at least recommended fee levels, which is not done due to competition considerations.

³⁵⁷ A similar situation has been presented to us by CEATL regarding the contract of Amazon Crossing, Amazon's imprint for translation publishing, whereby the wording of its licence agreement is that of a US work-for-hire contract (i.e. implying the commissioner as the owner of all rights). Another example of the Anglo-Saxon style contracting procedure is the imposition of a waiver on moral rights. In addition, it suffers from other unfair practices such as the transfer of known and unknown modes of exploitation and the unlimited duration of the transfer. Italy, 2 years max exploitation otherwise termination of contract can be requested under publishing contracts Section 127, 128 of Italian copyright act. The use of the publisher's jurisdiction is also denounced by visual artists: the

publishers negotiate the transfer of all economic rights, therefore seeking a broader scope of rights than those licensed under the original language work, and exceeding the term of that licensing agreement.

Our German correspondent notes, for instance, that especially in *journalism*, buy-out clauses are common practice. Furthermore, in the UK, the ALCS³⁵⁸ notes 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 five years*'. This resulted in '*49% of newspaper freelance journalists retained copyright against 35% of magazine freelance journalists*'. However, whether the contract exists at all or not (in which case, the journalist would arguably be retaining copyright) the association confirms journalists are not aware of what they can or cannot do under their relationship with the publisher. This uncertainty would extend to potentially remunerative areas such as syndication and sub-licensing of the work. It would thus appear that the level of agreement between the parties, or at least understanding, is limited to the upfront commission payment in exchange for a work. The situation of the underlying rights and secondary exploitation remains undiscussed.

In Denmark, the *DUJ*, the *Journalists' Union* explains that common complaints also include the complete global transfer of rights, including the right to resell to third parties and the inclusion of wording related to 'at present unknown uses'. In certain cases, rights holders feel coerced into signing such agreements and argue that freelancers should be able to negotiate collective agreements concerning the extent of the rights transfer. Especially given that, as we have seen above, agreements rarely require the publisher to exploit the works in spite of Section 54 of the Danish Copyright Act.

The *European Federation of Journalists (EFJ)*, in the context of its *Fair Contracts for Journalists Campaign*, warns journalists, and this appears their primary concern, against '*rights-grabbing*' contracts. In some of the sample (unfair) contracts and clauses we have been provided,³⁵⁹ we note that the assignment takes place regarding all rights and regarding '*all and any type of publication*'. *Duration is in this case set at 3 years*.³⁶⁰ We also note that the type and amount of remuneration is not specified (making it difficult for us to assess the contract fully). The requirement of originality of the works also appears to be missing.

Many of the issues raised by *visual artists* are similar to those explained regarding the all-inclusive scope of transfer. German photographers' association *FREELENS* confirms that buy-out clauses have become the norm in contractual agreements between publishers and photographers. As the *Whose Rights?* report³⁶¹ mentions, '*a provision to assign copyright is the most regular, the most drastic and the most unfair provision included in contracts commissioning photographers*'. Further, and that is probably the key issue, '*the provision is often worded in a way that disguises the far reaching and permanent effect of the assignment*'. Generally, the commissioned party receives a relatively small amount for the services delivered and is excluded from the following exploitation of the work'.

authors note that sometimes jurisdictions are used where a full assignment of copyright is allowed rather than using the jurisdiction of the author or the parties.

³⁵⁸ 'What are Words Worth now? Barbara Ann Hayes, Deputy Chief Executive, Authors' Licensing & Collecting Society (ALCS,) UK.

³⁵⁹ <http://www.ifj.org/campaigns/fair-contracts-for-journalists/>.

³⁶⁰ Spanish contract, provided as an example of unfair contracts under the above (ft 8) initiative. The contract recommended by the association is one where the rights are exclusively licensed for a period of 3 months (with specific scope and off-one publication).

³⁶¹ "Whose Rights?" is a booklet about unfair contract clauses in the field of photography prepared by Pyramide, the European umbrella organisation for professional associations for photographers with support from our members DACS and VEGAP.

Indeed, it would seem that, especially in the case of *journalists* and *visual artists*, where the publishing contract does not apply, the negotiation over the work and its underlying rights is not distinguished, with no distinction made in contracts. This is observed in clauses involving full exclusive assignment (of all modes and in all media known or unknown)³⁶² or clauses breaking down on the different modes of exploitation only to end with a catch-all phrase whereby the uses stated '*are merely exemplary*'. In the UK, visual artists also complain about the practice of grabbing exclusive rights being very common.

Sometimes, the scope of the contracts extends also to *future works*. Often, these come with no restriction in terms of tenor or type of work. The broad drafting of the future works poses a twofold challenge to the author, (i) one similar to the all-inclusive situation whereby the publisher is simply blocking the rights (with no intention of actually exploiting), and (ii) often leaves out detailed non-use clauses. In some cases, *future works* clauses are phrased as an option to acquire these works, often related to works 'in any genre'. It is also common that the exclusivity has unlimited duration. In the case of visual artists, associations complain that contracts often '*extend the commission and therefore the contract to all other works that are in any way related to the commission*'. Similar clauses exist in publishing contracts.

2.5.2 Digital exploitation & print publishing

Associations, at both EU and domestic level, identify different problems posed by digital publishing. Spain has been particularly active informing translators about the benefits of separating digital exploitation from the standard publishing contract.³⁶³ Each relates to a different series of rights and the business models are very different. That is, the remuneration, reporting, success benchmarks etc. are measured in different ways. Still, publishers tend to combine digital exploitation and print publishing in one single contract or, in the case of older contracts, by simply adding an annex to the main contract. Associations in Spain are very keen for authors to understand they need to demand separate exploitations and are negotiating separate model contracts with publishers in this respect.

Another reason why associations tend to recommend separate contracts is to be able to clearly separate contractual durations. Associations recommend shortening the duration of digital exploitation (generally to around 2 years). It is important, however, that the duration of digital exploitation also bears in mind the 'moving parts' represented by emerging and innovative business models.

Associations also recommend establishing separate remuneration percentages for digital (generally recommended rates of 15-40 per cent, in practice 25 per cent) and paper exploitation (between 8 per cent and 10 per cent) according to our Spanish representative. Associations recommend a higher percentage of royalties in the case of digital exploitation in light of the, arguably, lower cost this exploitation entails.

2.5.3 Reporting & publishers' obligations

In the UK, according to the *Author's Licensing and Collecting Society* (ALCS), '*many contracts contain stringent obligations on authors and contain assignments of all rights in the work for the life of copyright while containing very limited obligations on publishers to print, publish,*

³⁶² We have had access to the clause not the full contract.

³⁶³ *ACE Traductores* in Spain has been over the last couple of years negotiating among publishers a model contract, already adopted by 18 Spanish publishers. They have two recommended model contracts, one for print and one for digital.

sell or otherwise exploit the work'.³⁶⁴ Further, *'contracts commonly last for the life of copyright with no opportunity for review'*. Also the fact that the nature of the contracts is unclear appears to be common in the UK. The Society of Authors argues that currently, many publishers offer contracts that are *Print on Demand/e-book only*. Again, the main issue here is the overtly broad transfer of rights (e.g. long licence period with no advance, all rights including those they are unlikely to exploit and weak reversion clauses) with few obligations for the publisher.

In Denmark, for the *DFF*, the *Danish Authors' Society*, the main problem remains the lack of information of the author and the lack of control over the publishing of the work. Even if there is an obligation to publish under publishing contracts within a maximum of 18 months, there is no way for the author to control the marketing efforts. The *DFF* is of the opinion that authors should be able to terminate publishing contracts and get their rights back after the publisher has had a reasonable time to exploit the rights.

Similarly, in the case of e-books, the marketing efforts of the publisher are hardly ever quantified or specified. They are always very broadly drafted clauses, allowing the publisher to manage and adapt its investment. According to the *DFF*, this is the case in some 80 per cent of all contracts. Thus, the problem is not only caused by the legitimate right of the publisher to invest to the extent her investment remains profitable but also the lack of information to the authors with regards to the exploitation in near term. For the *DFF* this is a particular issue with e-books because they are fully demand based (i.e. there is no prior print edition for which demand is built). Another issue with e-books is that the phrase *'no longer in stock'* applies when *'the e-book is considered sold out when it is no longer digitally available for sales in the same means and efforts as the publisher's other publications of the same kind'*. With regard to e-books, there are no stocks, a copy to be 'sold' via streaming or download will come into existence when there is demand for it. Hence, there is no advance payment on e-books.³⁶⁵

2.5.4 Remuneration

Below are some examples of remuneration clauses which reflect, not so much the view that the remuneration as such is considered *'unfair'*, but rather the weakness of the obligations entered into by the publishers.

In Denmark, it is relatively common for authors to receive an advance payment, which nowadays is paid upon publication and not upon closing of the agreement as it used to (thus, no longer relying on whether and when the publisher released the work to the public).³⁶⁶ However, in approximately 50 per cent of Danish publishing contracts, no advance is granted for printed editions. In the case of e-books, there is advance payment. In any case, remuneration is considered a problem, sufficient to have voices argue in favour of a

³⁶⁴ The first two are UK examples of the first clause in *'An agreement for the transfer of copyright'* (1) *'You assign to us with full title guarantee all rights of copyright and related rights in your [Article/book]. So that there is no doubt, this assignment includes the assignment of the right to publish the [article/book] in all forms, including electronic and digital forms, for the full legal term of the copyright and any extension or renewals. Electronic form shall include, but not be limited to, microfiche, CD-ROM and in a form accessible via on-line electronic networks.'* (2) *'You assign to us with full title guarantee all rights of copyright and related rights in your [Article/book]. So that there is no doubt, this assignment includes the assignment of the rights to publish, reproduce, distribute, display and store the work in all forms, formats and media now known or as developed in the future.'*

³⁶⁵ These complaints around the e-book market in Denmark ties in with what we have explained earlier regarding e-Reolen and the lack of a liberalised market. In the words of the Danish representative, this leads to insignificant royalty payments of 10-50 euro per year.

³⁶⁶ Our Danish representative notes that in spite of this, advances are not returned.

remuneration right to a guaranteed amount. Indeed, the scenario presented to us by the *DFF* is one where payment is based on royalties established as a percentage of sales without a minimum fixed price. There is no insight either: 'sales' is represented as '*times x price of book sold*' but, then again, the publisher is entitled to unilaterally amend both parameters.

Denmark also highlights the emergence of a new type of contract whereby the author will transfer rights in exchange for 50 per cent of the *net profit*. The problem here is that *net profit* is a notoriously difficult measure against which to establish remuneration and some creative businesses are regularly accused of obscure accounting.³⁶⁷ Similarly, complaints are that although authors often believe 50 per cent of the profit is a good deal, the practice shows that net profits are often insignificant, especially in a market such as the Danish one, where few economies of scale are achieved in book publishing.

In Italy, even when the translator signs a publishing contract (and often transfers her economic rights for a maximum of 20 years since delivery of the work) she is almost never paid any royalty since the Italian copyright law gives the possibility, in the case of some works among which translations, to pay a *forfait* price for the transfer of rights. This possibility has become the norm and almost all publishing contracts for translations compensate the translator with only a (modest) lump sum for 20 years without possibility of revision of the contract.

Tying with what we mentioned above regarding the balance between the remuneration and the obligations undertaken by the publisher, some translators criticise how publisher sometimes 'play' with amounts and tenors through postponing acceptance of the translation or demanding additional work on the translation. These considerations are certainly very subjective and difficult to regulate and need to be taken on a case-by-case basis. Visual artists also complain about this type of issues.

Another problematic clause, such as presented to us in a French contract, is that where financial compensation takes place between several titles. In this case, royalties from a publishing agreement are compensated with royalties resulting from the audiovisual adaptation agreement.

In Ireland, authors' representatives also comment on how a particular wording, relatively uncontroversial in the context of accounting errors,³⁶⁸ has been recently used by two Irish publishers in a different way. The wording is the following: '*any over-payment made by the Publishers to the Author in respect of the Work may be deducted from any sums subsequently due to the Author from the Publisher in respect to any other work*'. These publishers apparently use this clause as a construct to allow them not to pay out royalties due to a successful title until all unsuccessful titles have earned out their advances.

We do not have any specific examples from the Hungarian market. Our correspondent, however, explains that a common complaint that authors in Hungary have expressed is that they are expected to finance publishers until retailers have sold a particular work.

³⁶⁷ As an example, please revert to link for so-called Hollywood accounting practices: <https://www.techdirt.com/articles/20150922/23582632339/more-creative-hollywood-accounting-revealed-goodfellas-lawsuit.shtml>.

³⁶⁸ Such as, for instance, those created by an unforeseen return of books that the publisher had believed to have been sold and had paid out royalties upon.

2.5.5 Termination

Further, also highlighted at large by all associations, many contracts lack termination clauses (against the law in some countries). Typically, the main advantage of such a clause for the author would be to protect against non-exploitation. However, situations involving merger & acquisitions or liquidation of the publisher are often not contemplated either. In some contracts, the publisher opts for automatic renewal clauses. This is the case in Spain, where associations complain of certain practices set to by-pass the limitation set in the law for publishing contracts. The Spanish TRLPI restricts publishing contracts to a maximum of 15 years (Article 69.4 of the TRLPI) but often contracts are signed with automatic renewal clauses to try to by-pass the law.³⁶⁹ In Italy, the situation is very similar.

In France,³⁷⁰ the more frequent complaints seem to revolve around the difficulty to enforce a reversion of rights, in particular in case of lack of exploitation and without having to sue the publisher. It is perhaps due to legislation protective of authors, where requirements such as the specification of modes of exploitation are already required by law, that French representatives tend to focus instead on how publishers use the term of the transfer as their largest bargaining tool. This term often extends to the full duration of copyright. Thus, many French representatives call for the imposition of an automatic reversion (against prior notification to the publishers). In addition, it appears that in France most contracts systematically require a transfer for the duration of the intellectual property. In that sense, the CPE³⁷¹ complains that an unlimited term of the grant of rights when a breach of contract by the publisher occurs, makes termination or legal action difficult (i.e. a consequence of the weak position of the author) and thus, the author is sometimes stuck in a legal situation where there is no commercialisation, no reporting and no payment (the CPE notes the case of out-of-print books).

2.5.6 Moral rights

In addition to what we discussed above regarding the practice of using contracts of US inspiration where the moral rights are regularly waived (e.g. Italy), the CEATL emphasises that even the *moral rights* are often in danger in the EU. According to the association *'literary translators are more likely than other authors to be the victims of infringements of their moral rights; this is valid for the right of attribution (name of the translator not mentioned on the work itself or in the publisher's communication tools, website, catalogue, etc.) and even more so for the respect of the integrity of the work (undue changes introduced without the translator's approval)'*.

Those infringements are usually the result of contractual omissions, but sometimes they may even be provisioned for in the publishing agreements. We have been presented with some examples of clauses from Germany and France whereby the publisher established the right to modify the translation as she deems fit.³⁷² In these situations, the translator is limited to the choice to take her name off the translation if she does not endorse it. These liberties of the publishers extend to choosing the translated title and names of characters. This is an interference with the work but, again, it should be taken on a case-by-case basis, as it can depend on the actual terms of the commissioned work.

³⁶⁹ For example, allowing termination lacking communication by the parties with a 60-days' notice.

³⁷⁰ This does not mean that some contracts do not try to bypass this.

³⁷¹ Conseil Permanent des Écrivains.

³⁷² For example, 'L'éditeur se réserve le droit d'apporter, à tout moment, à la traduction, les modifications qu'il estimera opportunes, le Traducteur gardant toutefois le droit, au cas où ces modifications ne lui conviendraient pas, de ne pas signer cette traduction, et de ne pas apparaître comme responsable du texte ainsi modifié'.

A similar story to that explained above regarding *ad-hoc* breakdown of rights into principal and subsidiary is that of the moral rights. In countries where moral rights cannot be waived, such as France, where clauses try to bypass the prohibition and in particular the right of integrity by stating: *'to the extent that the publisher has exclusive rights to the work, the publisher also has exclusive right to authorise changes into the work. According to this, the publisher has the right to publish the work only partly or as a part of any other entity'*.

For *visual artists*, the waiving of moral rights appear to be usual, even in countries where it is not allowed, although contractual commitments of the author not to exercise her rights. For instance, examples submitted establish that *'this assignment is granted with an exception from citing the name of the photographer, during the exploitation of the work'* or that *'will be free to modify or to adapt, as it seems fit, to change it more or less radically'*. Both of these are French. On other occasions the provision is a broad assignment of rights with no exception made to moral rights (*'each and every one'*). Associations argue that it is very difficult to justify such a waiver once the commissioner has accepted, and is thus satisfied with, the work.

2.5.7 Confidentiality requirement

Further, an issue that appears to be particularly affecting UK writers is the confidentiality requirement of contract terms and the waiving of moral rights, which is allowed by law in the UK. As the *EWC* indicates, many authors *'feel this is an unlawful restriction on their right to freedom of assembly and association under Article 11 of the European Convention on Human Rights'*. In Italy, translators also complain about the confidentiality requirement imposed by many publishers covering a contract which should, technically, be drafted in line with the legal provisions applicable to the publishing contract, and thus under relatively transparent terms³⁷³.

2.6 Competition law

2.6.1 Non-compete clauses

Even if they are relatively common practice in contractual agreements with book authors and translators, we believe it is especially in the field of journalism that is interesting to observe the extent of these non-compete clauses. Our legal correspondents have provided some useful examples. In Germany, non-compete clauses between newspapers and freelance journalists are invalid if they aim at preventing from working for other papers or magazines that are in competition with the newspaper, especially if the territorial scope is different. Such clauses contradict the concept of freelance journalism. Further, in the Netherlands, self-employed journalists complain that media companies demand long periods of exclusivity. Due to the short shelf life of news, such work could only be sold once the exclusivity period expired at very low value. Some respondents therefore regard this exclusivity as a sort of non-competition clause.

The collective agreement for free local papers (*'huis-aan-huisbladen'*) adds that photo journalists exclusively work for the company by which they are employed with regard to their photographic activities, in the absence of written stipulations to the contrary. Most collective agreements contain separate provisions concerning the performing of non-journalistic work for other parties. For newspaper journalists, the collective agreement provides that the journalist

³⁷³ In the original, it reads as follows: *'natura fiduciaria del contratto: Il contenuto del presente contratto ha natura fiduciaria. Le parti sono d'accordo nel mantenere la più assoluta riservatezza circa i dati, le notizie, le informazioni che possono acquisire nel corso del rapporto nonché circa il contenuto del presente contratto'*.

may not perform non-journalistic work for other parties without prior consent and in certain cases. In this regard, the collective agreements for opinion, popular and professional magazines also provide the same for journalists with a full-time employment. For journalists with a part-time employment, they provide that non-journalistic work for other parties may be performed without prior consent, provided that it is notified to management and editorial board in advance and that it does not prevent the journalist from discharging her duties properly.

According to the collective agreement for broadcasting employees, the employees, before performing ancillary activities, should ensure that the intended activities do not harm the employer in any of the following ways:

- the activities prevent the employee to discharge her duties properly;
- the activities concern a cooperation to a company of a nature that deviates to a significant degree from the nature of the employer, that this cooperation could jeopardise her reputation and credibility;
- the cooperation is only possible because of, or it relates to, the fulfilment of the journalist's tasks for the publisher's own paper, which is of exclusive nature or to which special costs are involved, and the other publicity organisation is not willing to compensate for the reasonable costs;
- the other party for which the work is performed is a competitor.

Other associations in Member States focus on the relatively accepted non-compete clauses (in line with labour law provisions) or comment on how provisions limiting the transfer of rights on future works serve the purpose of avoiding competition reasonably well. For example, in France, there are generally no non-compete clauses in publishing agreements. The way it is approached is through the use of Article L.131-1 IPC, which declares the general assignment of future works as null and void. In the case of publishing agreements, however, the author may grant the publisher the right of preference for certain future works under Article L.132-4 IPC. If this '*future works*' clause were to be well constructed and have an exploitation requirement (please see policy option 2), it could be a way to avoid overtly broad and vague non-compete clauses.

Regarding authors who work in the framework of an employment relationship (for instance who work in the press), the following limitations to free competition may exist:

- Even in the absence of any express provision, the employee is bound by a duty of loyalty vis-à-vis her employer until the expiry of her contract (Cass. soc., 12 Feb. 1985, 83-45704).
- An employment contract may contain a non-competition clause whose object is to prohibit the employee, after the termination of her employment contract, from joining a competitor or from engaging in any activity that competes with the activity of her former employer.

Ireland notes that non-compete clauses are generally limited to relatively standard employment contracts. Similarly, in Poland, our correspondent also notes that non-compete obligations in employment contracts, or similar contractual arrangements in the case of freelancers, are fairly common. However, none have been identified as posing a significant challenge to the position of authors. In Denmark, the Danish Journalists' Union (*DUJ*) also notes that it is fairly common and unproblematic in the case of employed journalists. In the case of freelancers, however, they warn of the potentially excessive scope of media outlets and uses to which the non-compete extends.

In the UK, many publishing contracts contain non-competition clauses under which the author promises, as long as the contract lasts, not to undertake any other works which might reasonably be considered either to compete directly with the existing contract or to '*affect prejudicially*' its sales or other exploitation. These are often expressed to cover not only directly competing works, but also abridgements or expansions of the same material, if done

without the publisher's consent. Contracts generally allow authors to use their material for professional purposes, e.g. for training or seminars.

The UK's Society of Authors, however, argues that many contracts do come close to unreasonable restraints of trade given that non-compete clauses are not restricted in terms of tenor or income threshold and are further very much subject to the publisher's subjective view without any requirement of 'reasonableness'.

The European Writers' Council also stresses the problem of overtly vague and broad non-compete clauses. This means that it is the publisher who can decide what competition is generally. An example of this type of clauses would be as follows: '*the author warrants not to publish during the period of the publishing agreement on authors or on any other's cost a work that competes with the work that is the subject of the publishing agreement between the publisher and the authors*'.³⁷⁴

In Italy, non-compete clauses are inserted in publishing agreements to limit the freedom of negotiation of the author in all the sectors under study. These restrictive clauses need double and specific signature to prove that the author is aware of them (Article 1341 of the Italian Civil Code). There are three main clauses:

1. Pre-emption: *ceteris paribus*, if the author will create a new work, the publisher of the first work shall be preferred for the new publishing.
2. Option: If the author creates a new work has to offer it for publishing to the publisher of the first work at the same terms and conditions of the first contract. The publisher has a set of time to decide. Only when this term is expired and the publisher does not offer a publishing agreement the author is free to offer the work to another publisher.
3. A clause that usually states: '*Obligation of the author not to publish, from the commencement date of this agreement and up to six months following the publication, of works that may arise in direct competition with the work object of the publishing agreement*'.

2.6.2 Collective bargaining and competition law

As noted above, in some Member States trade unions play an important role in the negotiation and conclusion of remuneration agreements between creators and publishers. This observation is particularly true with respect to journalists and translators. Nevertheless, trade unions of authors have not been set up in all Member States. Where they have, the extent of collective action varies, whether at the stage of negotiation of arrangements or at the stage of enforcement. Apart from socio-cultural reasons that may partly explain the reluctance on the part of authors to unite forces, legal reasons may also partly explain this phenomenon.

Even where self-employed authors have organised themselves into dynamic trade unions, the European rules of competition law can pose a major obstacle to their collective action. Indeed, such agreements are commonly frowned upon as a form of prohibited concerted practice between undertakings, which has as its object or effect the prevention, restriction or distortion of competition on the Internal Market contrary to Article 101(1) TFEU. The rules of competition law generally preclude the collective negotiation of remuneration contracts for self-employed creators. The tension between competition law and the conclusion of collective bargaining agreements for self-employed authors surfaced in an acute manner during the past decade,

³⁷⁴ Example provided by the European Writers' Council (January 2014).

with respect to various categories of self-employed creators in Ireland,³⁷⁵ Denmark,³⁷⁵ and in the Netherlands.³⁷⁶

The difficulties experienced by freelance journalists in Ireland and Denmark are discussed in a *Working Paper* published by the *International Labour Office* (ILO) in 2014.³⁷⁷ The author reports that, while the right of individual workers to freedom of association and protection of the right to organise, is recognised as a human right, anti-cartel laws have been applied in some countries to restrict freelancers from participating in collective bargaining. The Irish case against actors had an immediate effect on other media unions in Ireland, more specifically on the activities of the *Irish/UK National Union of Journalists*. According to the ILO report, the *Irish Congress of Trade Unions* raised the issue as part of the *UN Universal Periodic Review* process for Ireland. The right of self-employed journalists to engage in collective bargaining with publishers is still an on-going debate in Ireland.³⁷⁸

The 2014 ILO document further reports on a similar situation in Denmark, where the Competition Authority had instituted proceedings against the *Danish Union of Journalists* back in 1997. On appeal, the tribunal found that journalists who do work for a media enterprise of the same nature as that done by permanent staff cannot be regarded as conducting independent commercial activity merely because the work is based on an assignment.

Moreover the *Dutch Competition Authority* (NMa) published in 2007 a reflection document in which it stated that a provision of collective labour agreement laying down minimum fees for self-employed substitutes was not excluded from the scope of Article 6 of the *Dutch Competition Act* and its European equivalent (art. 101(1) TFEU, ex art. 81(1) EC Treaty). According to the NMa, the fact that collective labour agreements are negotiated between an association for self-employed workers and an employers' association changes its legal nature into an inter-professional agreement. This opinion of the *Dutch Competition Authority* essentially put a halt to a longstanding practice of Dutch associations of writers, translators, musicians, and photographers to conclude joint agreements with an employers' association.

As explained in a previous *Remuneration Study*,³⁷⁹ Germany is among the few Member States to address, in its national law, the problem of collective bargaining by self-employed workers. Article 12a was introduced in 1974 in the *Collective Bargaining Act* and allows specific categories of authors and performers (mainly self-employed workers in the press and television sectors) under certain conditions, to benefit from the provisions of collective labour agreements. The compatibility of this rule with the German rules on competition has, so far, never given rise to a legal challenge. The conditions laid down in Article 12a, according to which the provision applies to a person who is economically dependent and in need of social protection comparable to an employee would seem, at first glance, to correspond to the conditions set by the Court of Justice in the *FNV KIEM* case.³⁸⁰ The *FNV KIEM* decision builds on

³⁷⁵ Irish Competition Authority, *Agreements between Irish Actors' Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors*, E/04/002, 31 August 2004.

³⁷⁶ Joint Statement of the European Federations Representing Cultural and Creative Workers, on collective representation of freelancers in Europe. February 2010, <http://www.scenaristes.org/pdfs/freelance.pdf>.

³⁷⁷ A. Bibby, *Employment relationships in the media industry*, Working Paper No. 295, Geneva, International Labour Office, 2014, p. 19.

³⁷⁸ See also: NUJ calls for better rights for freelance workers, 9 September 2015, <https://www.nuj.org.uk/news/nuj-calls-for-better-rights-for-freelance-workers/>.

³⁷⁹ *Remuneration of authors and performers for the use of their works and the fixations of their performances*, Study prepared for the European Commission, DG DG Communications Networks, Content & Technology by Europe Economics and IViR, July 2015.

³⁸⁰ Case C-413/13 (FNV KIEM), Decision of the Court of Justice of the European Union, 4 December 2014.

previous case law of the CJEU³⁸¹ and scholarly writings³⁸² on the legal status and bargaining position of non-standard workers under competition law.

Besides Germany, a few other Member States have addressed the issue in certain specific situations. In France, Article L7112-1 of the Labour Code, which provides that any agreement whereby a press undertaking ensures, for payment, the assistance of a professional journalist is deemed to be an employment contract. The criterion to assess the existence of an employment contract is similar to the one used in Germany namely, the economic dependency of the worker, without need to prove the existence of a link of subordination.³⁸³

The Dutch Government attempted to address the conflict between protecting the freelancers right to collectively bargain and applying the rules on competition in the recent amendment to the Copyright Act. Instead of creating an exemption from the application of the anti-cartel laws, the law now provides that the amount of fair compensation may be determined by the *Minister of Education, Culture and Science*, but only at the joint request of an association of authors or performers and an exploiter or an association of exploiters.

There is no useful information from the other Member States concerning any particular issues in the context of competition law.

2.7 Key legal provisions for the remuneration of authors

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 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

³⁸¹ Case C-67/96 (Albany), Decision of the Court of Justice of the European Union, 21 September 1999.

³⁸² M. Ebisui, 'Non-standard Workers: Good Practices of Collective Bargaining and Social Dialogue', (2012) 3 *e-Journal of International and Comparative Labour Studies*, 211; E.F. Grosheide, 'Europa's spagaat: vrije mededinging versus werknemersbescherming', 2014 *Tijdschrift voor Arbeid & Onderneming* 143-146.

³⁸³ [See Remuneration Study 1] Cour de Cassation, 2e Civ., 25 mai 2004, Bull., 2004, II, n° 233; Cour de Cassation, 2e Civ., 13 décembre 2005, Bull. 2005, II, n° 318; see M. Zylberberg, *La distinction travail indépendant/ salariat – Etat de la jurisprudence*, Cour de cassation, Bulletin du droit du travail, 3e trimestre, 2008.

- 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.

Our legal analysis has suggested that other features of the legal framework pertaining to the publishing sector are less likely to have a direct impact on the level of remuneration of authors. Such is the case of open access policies in scientific publishing.³⁸⁴ New legislative developments in France (November 2014) are not part of this analysis because they are deemed too recent to have had an effect on the remuneration of authors. Self-publishing may generate income for authors.³⁸⁵ While this practice is not separately regulated under contract law or copyright law, it does presuppose that the author who engages in self-publishing has not assigned her right to a publisher that would prevent him from doing so.

2.7.1 Statutory provisions

On the basis of the analysis conducted in the present study, as well as that resulting from the examination of contractual provisions, we believe that any measures adopted to potentially redress the imbalance of bargaining power between authors and publishers should, at a first stage, focus on what is initially being contracted. When an author is most aware, from the beginning, of what is being contracted, such an author will be more empowered to choose a publisher and to negotiate effectively. Given that our legal analysis would suggest there may be some natural imbalance in bargaining power, favouring publishers, such greater transparency should, in turn, tend to promote more effective competition between publishers and a more appropriate relationship, in the contracts secured by authors, between the success of the work, the degree to which work is exploited commercially and the remuneration the author receives. We are aware that, in addition to the lack of transparency and reporting, issues have also been raised as regards the level of remuneration itself and how while the industry continues to grow, the situation of authors is arguably worse off. However, it is not the role of an economic and legal study such as this to assess the fairness of remuneration generated for authors per se. We can comment only on market functioning (e.g. asymmetry of information or imbalance of bargaining power), the degree of competition, the nature of contractual terms and the consequences for the functioning of the Single Market of a lack of harmonisation in legal frameworks. Level of remuneration per se must be the product of market processes, not market studies.

Copyright law may provide support to authors through a number of measures, including the fulfilment of formalities, a restriction on the scope of transfer of rights, rules on the form of payment (lump sum vs. proportional remuneration), rules on the interpretation of contracts, and rules on the termination of contracts and reversion of rights. However, not all rules have a direct impact on the level of remuneration paid to authors.

Our study of the legal framework and the on-going contractual practices in the ten Member States, as supported by the economic analysis, suggests that the protective measure with the greatest positive effect on the contractual position and the remuneration of authors is the

³⁸⁴ Please see Pooled Sampled Regressions in the Statistical Analysis

³⁸⁵ J. Gibson, P. Johnson, and G. Dimita, *The Business of Being an Author – A Survey of Authors' Earnings and Contracts*, London, Queen Mary Intellectual Property Center, April 2015, <http://www.alcs.co.uk/Documents/Final-Report-For-Web-Publication-per-cent282-per-cent29.aspx> where the authors write: It can be seen that the average return on investment from the respondents 'most successful' self-publication venture is a quite remarkable 154 per cent. However, as can be seen from the coefficient of variation, the range of spending to self-publish is very high. A median ('typical') return on investment for self-publishing is a more modest 40 per cent. The top 10 per cent of self-publishers all made a profit of £7,000 or more (the top 20 per cent making at least £2,975) whereas the bottom 20 per cent made losses of at least £400. It remains a risky venture therefore, but one where there are meaningful returns on investment in some cases.

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 requirement serves not only as a means to ensure greater transparency of transactions, but more importantly to circumscribe the scope of the transfer of rights, thereby strengthening the position of the author in her negotiations with the publisher. Moreover, it is settled case law in the Member States where this rule applies that, in case of doubt, the rights not specifically mentioned in the contract remain with the author. This protective measure is reinforced in the laws of some Member States by two complementary measures: first, by a prohibition (Poland, Spain) or restriction (e.g. Germany, the Netherlands) on the transfer of rights with respect of future modes of exploitation; and second, by a prohibition (e.g. France, Poland, Spain) or restriction (e.g. Germany, Hungary) on the transfers of rights with respect to future works. Such legal requirements ensure that authors do not grant overly broad assignments of rights with a potentially detrimental effect on their liberty to create in the future or to obtain remuneration from other sources for other forms of exploitation. These statutory provisions establish minimum rules, usually mandatory, regarding the content of the contract. However, a small selection of contract clauses provided by the relevant European and national associations of authors suggests that some publishers have few scruples bending the rules in their favour, thereby disregarding the application of mandatory rules, or taking advantage of loopholes in the legislation.

Various 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, best-seller clause) 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. The requirement to put a transfer of rights in writing is relatively meaningless, if it is not accompanied by supporting restrictions concerning the scope of the transfer. Moreover, an important aspect of the clauses pertaining to the execution and termination of the contract is that they are rarely applied consensually; in most cases, the author must request the intervention of the judge to bring the publisher so far as to either engage in the actual publication of the work, revise the remuneration paid to the author if the initial payment turns out to be disproportional in the light of the revenues generated from the exploitation of the work, or terminate the agreement in case the publisher does not meet her contractual obligations.

These clauses work rather as 'ex-post' remedies and, additionally, require enforcement by the author. Having authors challenge the contract can prove complex, expensive and time-consuming and thus impair the original purpose of the clause. Moreover, authors are often hesitant to challenge their contract in fear of endangering an on-going relationship with their publisher or being blacklisted by other publishers. In any case, the anecdotal feedback we have received, especially from the translation community, suggests it is all too common that the parties, especially the publisher who would have the active responsibility, do not follow-up on the contract's obligation to inform, including the overview of sales etc. This might contribute to the overall sense that 'ex-post' measures, for one reason or the other, fail to reach their full potential as legal instruments of control. While the above results from our analysis of contractual practices, from a purely regulatory point of view they remain powerful instruments granted by the legislator that are not present in other areas of the law. We have, therefore, tested versions of the legal indicator that include these clauses to assess if our empirical (economic) analysis would render conclusive results as to the materiality of these clauses.

The legal elements that have the most significant influence on the authors' remuneration are:

- Obligation to specify the rights assigned and the corresponding remuneration paid.
- Limits on the scope of transfer with respect to future modes of exploitation.

- Limits on the scope of transfer with respect to future works (without legal provisions, the contractual practice has developed that authors are required to offer their existing publisher a right of first refusal on future works).

2.7.2 Trade Unions and collective bargaining

The role of trade unions and associations of freelancers varies between sectors of the publishing industry and between Member States. Where collective bargaining offsets what would otherwise be a power imbalance in favour of publishers, the voluntary use of model contracts developed as a result of negotiations between representatives of authors and publishers can make the remuneration of authors closer to the economically efficient ideal. Widespread sharing of information, to the extent allowed by antitrust provisions, is typically to be encouraged as promoting economic efficiency and fairness and transparency in bargaining, and trade unions and associations of freelancers can play a role in diffusion of such information.

Trade unions, and CRMOs acting as trade unions, play a key role in developing and negotiating model agreements. This is the case for example in the Netherlands, where the CRMO, Lira, succeeded in negotiating model agreements in different sectors (literary books, educational books etc.) with the *Dutch Association of Publishers*. With the current model agreement, the exploitation of e-books *is* included as a primary exploitation right. According to this agreement, Dutch authors grant the publisher the exclusive licence to exploit the (yet to be created) work, including the right to enforce the licensed rights.³⁸⁶ The publisher has the exclusive licence to publish the work as a paper book or e-book, or to conclude contracts with third parties to exercise these exploitation rights.³⁸⁷ *E-book* is broadly defined as a '*digital file containing the contents of the work*'.³⁸⁸

In some Member States, the collective bargaining agreements reached between employers and employees are rendered applicable to non-employed but *economically dependent freelancers*. In 2014, France adopted a provision according to which (Article L.132-17-8 of the CPI) collective agreements concluded in representative bodies are extended to the entire sector. This practice corresponds to the findings of the *Court of Justice* in the *FNV KIEM* case.³⁸⁹

³⁸⁶ Article 1(1) and (2) of the Model Agreement for Dutch Literary Works (MADLW).

³⁸⁷ Article 1(3) and (4) MADLW.

³⁸⁸ Article 1(3) MADLW: 'Een e-boek is een digitaal bestand dat de inhoud van het werk bevat.'

³⁸⁹ However, we note that it is too early to tell what the impact of this provision is in practice.

3 Understanding Payment Flows

The purpose of this section is to clarify the relationship between authors and the various players that are involved in the supply chain. It is necessary to 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 identify 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 creators who reject the mainstream route to selling their products face different systems in terms of rights management and remuneration. We consider the key relationships for each group.

This chapter presents a complete picture of the supply cycle, covering all stages from creation to the point at which the creation reaches final readers/audience. Both online and offline distribution channels are considered along with a separation of mainstream versus more alternative supply-chains, where this is necessary. These represent generalised mappings, as slight differences may exist across countries.

The flow charts presented for all categories of authors follow an overarching set of guiding principles. Firstly, the diagrams presented relate to mainstream cases and provide high-level descriptions intended to cover a wide range of authors for each category explored; they do not attempt to represent every possible scenario. Where alternative scenarios that are quite common are considered, these are represented by dotted arrows. Moreover, the represented dynamics illustrate a number of possible flows of rights, licences or incomes which might not be identical in every country within our sample. However, country specific information is explored in the legal analysis and considerable deviations from the presented flow charts are also mentioned in this chapter.

A second point of importance is the classification (through the usage of different colours) of the various flows that are described:

- Rights: this refers to cases where most often the author transfers some of her rights to the recipient, who is usually the publisher. As explained above, this is intended to capture general cases and it does not imply that all authors will transfer their rights to the publisher nor does it make a specific prediction about which rights will be transferred. It does, however, imply that there is usually a transfer of at least some rights.
- Licences: this category is used to refer to the distribution of the published version of an authors' work from the publisher to the various players at the retail level and from these players to the end users. It also covers the contractual agreement between authors and CRMOs (mandate for the exploitation, for statutory or voluntary collection/distribution of proceeds...) and the consequent variety of activities that are licensed by CRMOs to exploiters, as will be described below.

- **Royalties:** the term royalties has been chosen to represent only streams that are strictly commensurate to the amount of works sold/licensed (i.e. they only refer to proportional remuneration). All other forms of contractually agreed shares of income are covered below.
- **Payments:** This refers to any direct or indirect fee covering the contractual rights to remuneration that would be agreed between a publisher and the author that would be of a one-off lump-sum nature, as well as the monies paid on the basis of a remuneration right (lending, cable retransmission) or on the basis of fair compensation for exceptions (private copying, reprography, educational use).

3.1 Revenue streams

Authors have the following potential sources of income:

- **Sales of physical content (e.g. printed books, newspapers or magazines, journals, photographs, illustrations or designs):** These sales are subject to royalty payments as defined by the contractual agreement between the author and the entity responsible for developing the author's work in a marketable form (in the mainstream case this would be the publisher). These payments are made to remunerate authors in exchange for their reproduction and distribution rights. As an alternative, or an addition to, royalty payments are one-off lump sum fees agreed between the two counterparties which are meant to remunerate the author independent of the amount of copies sold.
- **On-demand access of digital content (e.g. eBooks, audio-books, subscription services, online newspapers and online magazines):** Contractual arrangements between authors and their publishers, broadcasters or producers (in the mainstream case) are the point of reference with regards to the level of remuneration that authors can expect from the sales or the provision of on-demand access for their content in a digital form. On-demand access in this context relate to the "making available right" which is part of the wider family of the "communication to the public right" and also to the "reproduction right" as far as direct downloads and streaming are concerned. With the digital business models being the result of relatively recent digitisation trends, the contractual dynamics governing these income streams can be understood to be less mature than the ones underlying physical sales. Moreover, transactions in these categories can potentially relate to new, yet unidentified business models that can be developed in the future.
- **Secondary exploitation of their work:** This category covers the use of the authors' work by third parties for other revenue generating purposes. An example of this would be the use of an author's book as the basis for a movie script; this would require the movie producers clearing the "reproduction right" by obtaining a licence for this use from the authors and/or their publisher. An additional example, relevant for illustrators, would be merchandise retailers who make use of an illustrator's creation on their products and who would need to clear the illustrators' "reproduction rights" and the right of communication to the public.
- **Communication to the public, public performance or exposition of their work:** Such performances cover a variety of activities which can include public readings of a book, a translated book or an article, poetry, literary or visual arts festivals, educational recordings, broadcasting (and re-broadcasting) in general or cable re-transmission more specifically. These activities are covered by the "communication to the public" right for the use of which a licence needs to be granted in order for these activities to be lawful. CROs are often involved in the process of licensing and monitoring these uses and distributing any applicable fees generated by them and the corresponding communication to the public right. It is important to distinguish between public performances (or direct presentation of a work) and other means of communicating to the public (which includes broadcasting) primarily because the framework governing the former is not harmonised at EU level while it is harmonised for the latter.

- Uses by end-users: This refers to the income generated from the remunerated acts of lending by members of the public, as well as from the compensated acts of reproduction for private purposes, reproduction by means of reprography, and in some countries, for educational uses. These sums are almost always collectively managed by CROMOs.

While these different sources of income cover authors in general, the relative importance of the above mentioned income sources will vary both across different authors in the same category according to their individual characteristics, as well as across the different categories of authors.

3.2 Key players

The below paragraphs provide a general description of each key player's involvement in the value chain for all categories of authors. All authors are covered in this section and author categories for which the different key players may be less relevant are highlighted.

Agents

Agents are parties hired by the authors in order to maximise their exposure to the various sources of income generating potential. They will provide their services in return for a fee, often taken in the form of a commission, expressed as a percentage of income which can vary across different streams. Agents can play an important role in providing access to very favourable opportunities and therefore expanding the authors' horizons, however, they are more relevant for authors of books and visual artists and not for any other categories.

Publishers

Publishers are central to the supply chain of most categories of authors. The publisher agrees a contract with the author which specifies the rights assigned from the author to the publisher. This can happen in two forms; a full transfer of rights is one possibility with a licence being the other one, if the author retains her copyright. In the context of an author of a book, for instance, the contract with the publisher would specify the media through which the book (eBook, physical copy etc.) can be distributed and in which territories. Publishers are also often responsible for hiring translators and clearing their rights in cases where they intend to distribute the book in international markets. Moreover, publishers can also exploit the authors' work by selling them or licensing their usage directly to libraries.

In particular cases, such as those relevant to authors of scientific articles for journals, publishers are the ones offering direct online access to users to the author created content.

Similarly, for other categories of authors, the contract would likely specify the period and territories in which the visual artist's work could be reproduced, as well as the specific medium or placement of the author's work, e.g. digital or print, front cover or internal. In addition to the rights to reproduction, distribution and making available, publishers may negotiate with authors over other rights, such as translation rights and film rights. The contract also stipulates the remuneration arrangement between the author and the publisher in terms of: (a) an advance payment from the publisher to the author; and/or (b) an agreed royalty rate for the author. The contractual relationship between an author and a publisher is subject to the individual legal frameworks observed in different Member States. The extent and nature of the rights transfer will vary by author category and by Member State. However, the vague language on the scope of the transfer of rights is often present leading to situations such as that of a 'double assignment' of the rights as explained earlier on, as reported in the Netherlands, in the legal section.

Aggregators³⁹⁰

Aggregators are of importance to book authors. They are highly relevant in the field of self-publishing as they will take the manuscript written by an author and, in return for a fee, convert it to a format that can be subsequently published by the main electronic retailers.³⁹¹ Aggregators are a consequence of digitisation and are hence a relatively new player in the industry. As such they still have evolving business models and rather diversified product offerings ranging from a simple format conversion to more elaborate services such as cover design or copyright management.³⁹² Aggregators are mostly “business to business” service companies aiming at connecting content and distribution services.

A different kind of aggregators is active in the journalism industry. News aggregators are software or web applications which aggregate web content such as newspapers, blogs, podcasts or video blogs in one location for easy viewing. Examples of news aggregators are websites like Google News and applications like Flipboard.

Secondary users

Secondary users are individuals and organisations that want to use the creative work for other revenue generating purposes. They will need to obtain a licence either directly from the author or from the relevant licensee or copyright owner, e.g. the publisher, if the author has assigned the right in question to them. Secondary users can range from film producers, looking to use an author’s creation as a movie script, to broadcasters that might need to use material for a TV show and even to companies that want to make use of a photograph to print t-shirts. This category has been purposely defined in a generic nature in order to capture all other potential revenue generating opportunities. The magnitude of potential income streams as well as the percentage of the generated income that will be earned by the author will vary considerably across different cases.

Collective Rights Management Organisations (CRMOs)

CRMOs are a critical aspect of the supply chain for authors, as they ensure the flow of payments to authors from different sources. First, where individual licensing is impracticable, CRMOs are often entrusted with the collective management of exclusive rights, for example, the right of cable retransmission, the rental right and the right of reproduction. Second, CRMOs also ensure the collection and distribution of the sums paid for public lending by libraries. Third CRMOs collect the sums due for acts of reproduction by means of reprography in libraries, educational institutions, local and central governments and other business organisations, as well as for acts of private copying and in some countries, for educational uses.

Libraries

Libraries offer their patrons access to their catalogue of publications (this can include books, periodicals, magazines and academic journals). The extent to which becoming a patron requires a payment will depend on whether the library is public or not and might also depend on the potential patron being a member of particular organisations. In any case, libraries need

³⁹⁰ In the past the term “aggregators” covered entities that were active in a different area: it referred to intermediaries used by libraries and publishers for services such as orders-handling, billing, payments, renewals and cancellations. Galyani, G. and Moballegghi, M., (2007), “The Importance of Aggregators for Libraries in the Digital Era”, p6.

³⁹¹ Source: http://www.ebookdesigns.net/ebook_aggregator_vs_self-publishing, seen on 16/03/2015.

³⁹² Bookwire, for instance, is an eBook aggregator specialising in the marketing of digital content in all existing and emerging sales channels worldwide. It offers a full service package of delivery, reporting, quality management, shop marketing and conversion. Numilog, a second example is the main e-books aggregator in France for multi-format e-books, especially PDF and EPUB, and offers digitisation and distribution services to the major French-language publishers and some major English-language publishers. Smashwords is another example; it provides authors with tools for marketing, distribution, metadata management and sales reporting.

to acquire physical copies of books etc. and licences in order to provide lawful access to their catalogue to their patrons. At the same time, reprography activities are likely to be common within a library and this might require, in most countries, the payment of fair compensation.

Educational institutions and other organisations

This category is meant to capture organisations which offer a multitude of users access to a catalogue of books (similarly to libraries) and where reprography activities are expected to take place. As with libraries, as far as reprographic activities are concerned, in some countries, a licence needs to be obtained beforehand.

Providers of public performance or exposition and broadcasting of authors' work

Providers of public performance or exposition and broadcasting of author's work is a wide category encompassing a number of players. A non-exhaustive list of communication to the public includes public readings, poetry or literary festivals (the providers in these two cases would be the organisers of the events), the broadcasting (and the re-broadcasting) of audio or audio-visual extracts that contain excerpts of copyrighted work as well as the cable retransmission of such excerpts (the providers in these two cases would be the broadcasters).³⁹³ Communication to the public is identified as a stand-alone category due to the fact that it is better managed collectively rather than on an individual basis.

Physical content providers

Physical content providers refer to all retailers who would be engaging in the sale of printed or other physical products, e.g. a DVD with audio-visual translation content. This would include both bricks-and-mortar retailers and online retailers of physical products such as the online departments of retailers like WHSmith or the departments of Amazon responsible for physical sales.

Digital content providers

Digital content providers are the ones providing access to digital content. On the one hand they provide permanent access to digital content such e-books, e-magazines, audio-visual content etc. through retailers like Amazon's Kindle service or Apple's iTunes Store.³⁹⁴ On the other hand, digital access can also be "on-demand" allowing users to access a bespoke offering and to choose their content at will from a provider's database. Such "on-demand" offerings are quite common for news websites, online magazines and online film and television streaming (e.g. through Netflix or Amazon Prime) but are currently a less common practice in the book sector. However, there are providers of "on-demand" book content, such as Scribd or Amazon's Kindle Unlimited, who have tailored agreements with publishers and aggregators regarding remuneration and which are the result of bilateral negotiations.³⁹⁵ In some cases, such as publishers of scientific journals, the publisher may be the one providing the digital content access.

Stock agencies

Stock agencies are key players in the visual arts industry, specifically for photographers and illustrators. The role of stock agencies should not be confused with that of agents, with the

³⁹³ According to the Authors' Licensing and Copyright Society (ALCS), cable retransmission is "the simultaneous showing of one country's broadcasting via a cable network". When this type of broadcasting contains work attributed to authors protected by copyright, there can be CRMO involvement to collect and distribute the generated fees.

³⁹⁴ Such transactions cannot always be qualified as "sale" because there is not transfer of ownership on the digital copy of the work. See: Digital Consumers and the Law: Towards a Cohesive European Framework Mr. dr. L. Guibault, Prof. dr. N. Helberger, Mr. drs. B. van der Sloot, & M.B.M. Loos, C. Mak, L. Pessers Information Law Series, nr. 28, Alphen aan den Rijn: Kluwer Law International 2013.

³⁹⁵ Source: <http://www.forbes.com/sites/billrosenblatt/2015/04/24/subscription-services-for-e-books-like-netflix-like-spotify-or-not-at-all/>, seen on 12/11/2015.

latter's role to more directly represent the author and their rights in reaching a deal with a publisher, broadcaster or other relevant party. Stock agencies, on the other hand, provide large online, digitised collections of pre-produced visual content which are available to search, purchase usage rights for and download. Stock agencies, therefore, do not seek to represent the visual artist in negotiations with potential exploiters of their work, but simply provide an intermediate channel for the promotion and dissemination of their work. Stock agency content is typically available on either a rights-managed or royalty free basis, both of which will be described in more detail in section 2.7.2. Microstock agencies are a more recent development in the visual arts industry that offer a potential income stream to a much broader scope of photographers and illustrators, including amateurs and hobbyists, by selling their content at low prices and royalty free.

Traditional boutique agencies also continue to operate alongside these larger stock and microstock agencies.

Press agencies and advertising agencies

As well as in the works of publishers, visual content produced by photographers, illustrators and designers may also be incorporated into the work of press or advertising agencies. These market participants should not be confused with the stock agencies described above. The role of stock agencies is simply as an intermediary involved in providing ease of access to potential exploiters of visual artists' work, while press and advertising agencies are potential exploiters who want to make use of the visual artist's work as part of a broader project. They may make use of stock agencies as an intermediate supplier of visual content, or commission, or purchase, work from visual artists directly. Press agencies may, for example, need images of a particular sporting event in order to embed those images in a related news article, or may want an illustration which reflects a particular stance on a recent news story. Advertising agencies, on the other hand, may make use of imagery for advertising campaigns in magazines or on websites, if this is considered to be more commercially viable than producing the visual content in-house.

Photographic cooperatives

Photographic cooperatives are formed from a collection of photographers who share facilities, equipment, and marketing and administrative support. Although omitted from the industry supply chain for the purposes of clarity, if included they would sit directly below the photographer at the creation and promotion stage.³⁹⁶

3.3 Authors of books

The creative work of the categories of authors covered in this chapter can reach readers and audiences in a variety of different formats. With the rapid technological advancements that have taken place in recent years and the digitisation of numerous aspects of consumers' everyday lives, there are now more options than ever for a reader wishing to access content.

This section will first provide a high-level description of recent trends in the publishing industry, explaining how technology has affected the publishing landscape and how it has transformed the industry. Secondly, it will provide an overview of the flow of rights and payments for authors of books.

³⁹⁶ This is explained in more detail in section 3.7.1.

3.3.1 Evolution of the publishing industry

Book publishing is one of the largest cultural industries in Europe, with sales that exceed €36 billion, and employing slightly less than 650,000 people.³⁹⁷ The industry contributes to the development and preservation of culture, information, education and democracy at large in Europe.³⁹⁸ The role of publishing covers the aggregation, editing, designing, pricing and marketing of books. Publishers are responsible for the “quality” of work and for dealing with other parties of the value chain including the technical intermediaries, i.e. printers, and the specialised workforce in proofreading.³⁹⁹

At the turn of the century, a technical transition pioneered by internet technologies, cloud computing, smart devices and other developments began in the publishing sector, presenting a mix of threats and opportunities for key industry stakeholders at the time. These threats included the introduction of new players and technological capabilities that have been shifting the balance of value away from the upstream parts of the supply chain and closer to the downstream.⁴⁰⁰

This point is highlighted in research conducted by the Joint Research Centre of the European Commission, which identifies a new industry structure with less emphasis on integrated publishing firms in the *Media and Content Industries* (MCI) and greater focus on consumer needs as a result of the digital shift.⁴⁰¹ The downstream companies that access the end consumer are in a unique position to collect a considerable amount of information on demand patterns and consumer characteristics, enabling them to provide highly bespoke products.

The changes in the competitive landscape of the book publishing market have generated support for the notion that e-books will, in the future, edge out print as the more prevalent format for publishing by 2018, as illustrated by their growing presence in Figure 3.1 below in particular illustrates how e-books are expected to become a growing part of total book revenues across three separate categories of consumer, educational and professional books. In all cases, revenues from e-books are expected to more than double in the period 2013-2018 while revenues for print books decline. An interesting point is that e-books have a consistently lower share in the educational category, indicating that take-up in education is slower and that there is still room for technological advancements in this area.

There might be various reasons for the slower pace of technological advancements in the educational sector. Firstly, the use of an educational book is different from the one of a non-educational book as students might exhibit a preference for physical book ownership for studying purposes. Moreover, there might be active second-hand book markets, which provide “liquidity” to educational books and incentivise students to purchase physical books.⁴⁰² As a consequence the digitisation of the learning process can be a particularly challenging process for publishers and education representatives.

³⁹⁷ Ernst & Young (2014), “Creating growth: Measuring cultural and creative markets in the EU”, December 2014.

³⁹⁸ <http://www.smartbook-tisp.eu/resources/ict-innovation-empowering-the-european-publishing-sector#>.

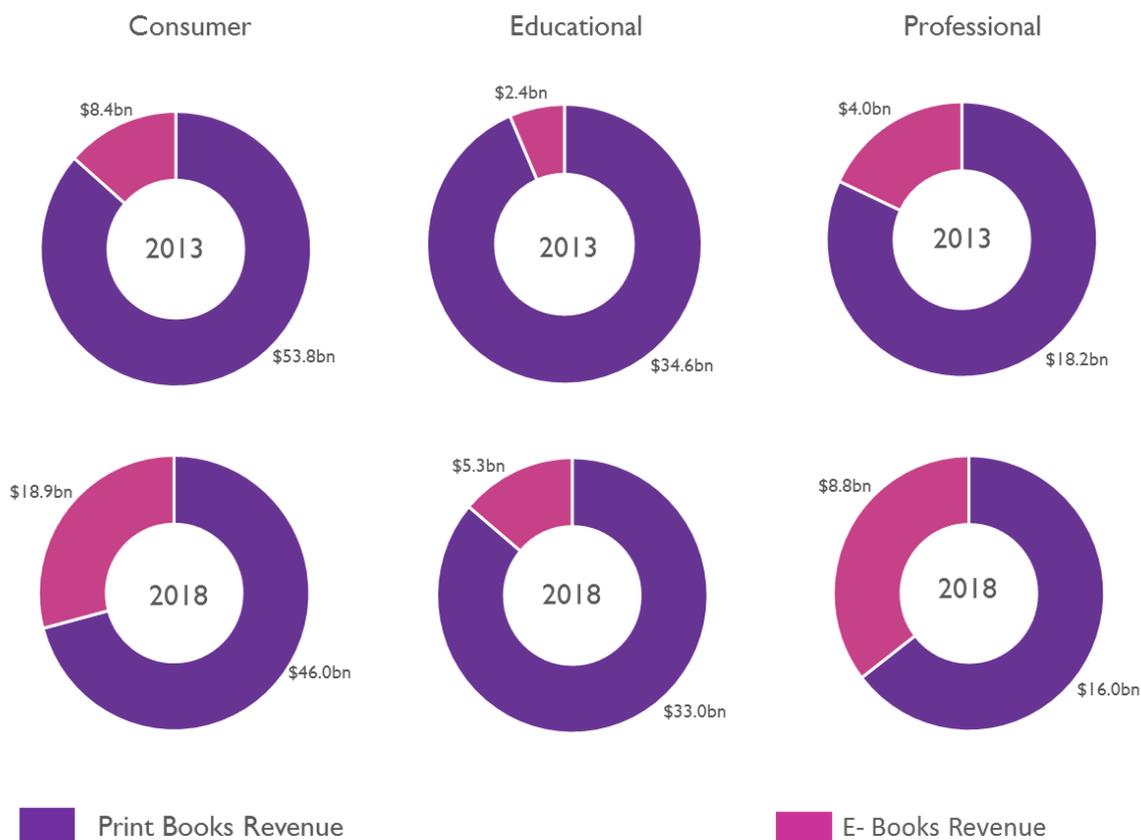
³⁹⁹ Palgrave Connect Online service (2014), “Digital Media Worlds: The New Economy of Media”, Editors: Giuditta De Prato, Esteve Sanz, Jean Paul Simon, Palgrave Macmillan, p93.

⁴⁰⁰ Jean Paul Simon, Giuditta de Prato, 2012, “Statistical, Ecosystems and Competitiveness. Analysis of the Media and Content Industries: The Book Publishing Industry”, The European Commission, p64.

⁴⁰¹ Bogdanowicz, M. and Simon, J.P. (2012), “The digital shift in the media and content industries”, Policy brief by the Joint Research Centre Scientific and Policy Reports, p.9-12.

⁴⁰² Second-hand book markets provide liquidity to educational book, as students might be aware that they will be able to re-sell the book they have purchased.

Figure 3.1: Global Print and Electronic Share (%) of total book revenue (US\$bn), 2013 and 2018



Source: PwC, "Global entertainment and media outlook 2014-2018", Information, Telecoms and Media.⁴⁰³

As far as the educational category is concerned, some of the highest ranking publishing conglomerates in terms of revenues are specialised in either educational publishing (Pearson, McGraw-Hill, Cengage and half of Holtzbrinck), or in professional and STM (science, technical and medical) publications. These groups have undergone significant changes over the past decade as they reorganised, merged or consolidated.⁴⁰⁴ Pearson, for instance, initiated a sequence of acquisitions starting in the early 2000s with the aim of expanding its educational business exposure.⁴⁰⁵

According to a study on the book publishing industry educational books growth is predicted to outpace revenue growth in consumer and professional books. Between 2014 and 2019, total global educational books revenue will grow at an annual rate of 2.0 per cent, exceeding that of consumer books (0.8 per cent) and of professional books (1.6 per cent). Educational books are expected to benefit from strong growth in digital sales and only a marginal shrinkage in print, with print books still being easier to share around a classroom and pass on to new students.⁴⁰⁶

⁴⁰³ <http://newsbreaks.infotoday.com/NewsBreaks/Ebooks-in-2015-Trends-and-Forecasts-Part-1-101446.asp>.

⁴⁰⁴ Wischenbart, R. (2014), "Global eBook. A report on market trends and developments, p.88.

⁴⁰⁵ These acquisitions included AGS in 2005 (US School market), Maskew Miller Longman in 2007 (south, central and east Africa) and Grupo Multi in 2013 (an English-language training company based in Brazil). Source: The Pearson timeline, <http://timeline.pearson.com/>.

⁴⁰⁶ PWC Global entertainment and media outlook 2015-2019: <http://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/2015/book-publishing-key-insights-5-educational-books-growth.pdf>.

Issues with digitisation

Digitisation has however created challenges. A key illustration of the tension between print and digital publishing was the dispute between the major online retailer Amazon.com, and one of the world's largest publishing conglomerate Hachette in early 2014. Much of the debate remained private until Amazon halted sales of some Hachette books with methods such as reduced discounts, delayed shipments and advertising other books alongside Hachette titles with the banner, "similar items at a lower price."⁴⁰⁷

The publisher argued that Amazon wanted to control the prices of e-books to level the market, while Hachette wanted to set its own prices, scaling them depending on the author, release date, the book's success, etc.⁴⁰⁸ Meanwhile Amazon argued that Hachette was resisting the changing times as e-books should be cheaper considering production savings.

After a near 8-month dispute, the corporations settled on a multi-year deal whose terms were not fully disclosed, though reports say that Hachette now has significant control over the pricing of their e-books.^{409,410} According to a Guardian article, Amazon claimed that specific financial incentives were included in the final deal with Hachette incentivising the publisher to deliver lower prices.⁴¹¹

Changing business models

The technological transition has changed the cost structure for (at least parts of) the publishing industry. Digitisation has resulted in a significant shift in the cost basis that traditionally characterised print business models. Costs such as printing, physical transportation and storage have been completely altered for digital business models while some remain unaffected (creation, authors' advances, editorial process), and others are simply shifted or shared with IT (promotion, marketing and sales). Existing distributors and publishers needed to incur costs in order to install and learn how to use technologies that would enable them to utilise the full potential of IT introduction. These costs were probably the main reason why distributors and publishers in some countries were unable to adapt, resulting in three of the biggest EU markets being characterised as "bookshop markets" (Germany, France and Spain).⁴¹²

Digitisation also offered external players (such as Amazon, Google and Apple) a unique opportunity to leverage their technological know-how in order to satisfy the newly created demand for IT capabilities in the market. It is not surprising then, that the main changes in e-markets were driven by such external players, who were not re-inventing their business models but were rather only expanding their product offering.⁴¹³

⁴⁰⁷ Amazon Vs. Book Publishers, By The Numbers, 2014, <http://www.forbes.com/sites/jeffbercovici/2014/02/10/amazon-vs-book-publishers-by-the-numbers/>.

⁴⁰⁸ "Amazon vs Hachette: readers and authors take sides in publishing dispute", 2014, <http://www.theguardian.com/books/2014/aug/12/amazon-hachette-readers-authors-publishing-dispute>.

⁴⁰⁹ "Amazon and Hachette settle bitter e-book dispute", 2014, <http://www.cnet.com/uk/news/amazon-and-hachette-settle-bitter-e-book-dispute/>.

⁴¹⁰ "S&S to Go Agency With Amazon", 2014, <http://www.publishersweekly.com/pw/by-topic/industry-news/industry-deals/article/64458-s-s-to-go-agency-with-amazon.html>.

⁴¹¹ "Amazon and publisher Hachette end dispute over online book sales", 2014, <http://www.theguardian.com/books/2014/nov/13/amazon-hachette-end-dispute-ebooks>.

⁴¹² Jean Paul Simon, Giuditta de Prato, 2012, "Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Book Publishing Industry", The European Commission, p88.

⁴¹³ Jean Paul Simon, Giuditta de Prato, 2012, "Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Book Publishing Industry", The European Commission, p88.

Self-publishing

Technological developments have enabled authors to pursue an alternative publishing channel, bypassing traditional entities such as publishers. An author choosing to self-publish makes the conscious decision to forego the offerings of a publishing house (such as editing, marketing and distributing) and instead retains the responsibility for the entire publishing process. Alternatively, authors who are not able to secure a deal with a publisher may choose to opt for the self-publishing option. In doing so, authors earn a higher percentage of sales but, on the other hand, need to invest a considerable amount of time and effort in order to undertake the various activities that would normally be a publisher's responsibility.

There are three main models of self-publishing; the first one relates to physical sales (on-demand-printing), the second one to electronic sales (e-books) and the third, outdated model is that of "vanity-publishing". On-demand-printing allows self-publishers to avoid incurring costs of bulk printing and instead print physical copies of books which can then be distributed (by the print-on-demand companies) when the demand arises.

Authors who wish to make their books available online need to engage in e-book self-publishing. A necessary step for this process is to bring an author's book to an electronically acceptable format that can be used by online retailers. While there can be various acceptable formats such decisions are primarily driven by what the target retailer specifies as an acceptable format type. The formatting process can be facilitated by players such as aggregators but there is also the option to follow the self-publishing channel provided by retailers themselves.

Online retailers, such as Amazon and Barnes and Noble, provide a comprehensive set of directions for authors who wish to self-publish through them. For instance, Amazon offers the "Kindle Direct Publishing" service for e-book publishing, "Create Space" for publishing to print and ACX for publishing to audio.⁴¹⁴ This is a still evolving business model and as such the key stakeholders are likely to undergo transformations and changes in the future. It does, however, provide an alternative to authors which allows them to maintain control of the process and offers them a lower cost option.

The third option of vanity publishing is an indirect form of self-publishing which has become outdated in the current digitalised era. Back in the time when print was the only option for authors the importance of publishers in the supply chain was much greater. It was not always possible for authors to secure a publishing contract and this gave rise to some publishers agreeing to publish an author's work in return for an upfront payment from the author. After such a transaction the rights would be held by the publisher.

Nowadays, this sort of interaction has transformed with payments from authors to various other players in the self-publishing supply chain occurring in return for specific services and entailing no transfer or licensing of rights. This would classify such transactions under the domain of either print-on-demand publishing or e-book self-publishing.

The share of self-publishing is growing at high rates in countries where e-books represent a considerable part of the market such as the UK and the US. For instance, self-publishing in the UK grew by 79 per cent in 2013 in a market that during the same period experienced a 4 per cent contraction in aggregate book purchases. Self-published books captured only a small part of total books sold in 2013 (5 per cent) but this represented a considerable increase compared to 2012 when self-published books only represented an approximate 3 per cent of the

⁴¹⁴ Source: <http://www.amazon.com/gp/seller-account/mm-summary-page.html?topic=200260520>, visited on 17th April 2015.

market.⁴¹⁵ Self-publishing has also taken off in the US where self-published titles have tripled since 2006⁴¹⁶ and in Germany.⁴¹⁷

Industry developments and policy changes

ICT2013

The Innovation Union is a Europe 2020 flagship initiative aimed at securing Europe's global competitiveness, and seen as a means to drive economic growth and create jobs.⁴¹⁸ In the framework of these goals, project proposals were collected from IT and publisher representatives at the ICT2013 to establish cooperation within the industry, in the age of digitisation.⁴¹⁹ Noteworthy goals in particular were:

- New projects should be closer to market needs and new solutions should be readers-driven. Publishers need real solutions to reach out new users.
- Libraries in the digital era should change their functions from preservation and storage to spaces for accessing cultural resources in new ways. The libraries are the best places to experiment and test the future of reading.⁴²⁰

VAT

Until 2014, the VAT imposed on e-books was based on the VAT rate for the country in which the retailer was based. Retailers were thus able to locate their European headquarters in Luxembourg for example where the VAT was only three per cent, a rate that was practically negligible. On January 1 2015, new European Union VAT rules were put into effect; VAT is now charged based on the customer's geographic location. Any observed differentials in taxation matters between countries are expected to heavily influence the profitability of involved stakeholders which will be considerably influenced by market conditions and the ability to pass through costs.

Fixed Book Price

| Country | Fixed Book Price | E-books covered? |
|---------|------------------|------------------|
| NL | Y | x |
| GE | Y | Y |
| FR | Y | Y |
| UK | x | --- |
| IRE | x | --- |
| SP | Y | Y |
| IT | x | |
| PO | x | --- |
| HU | x | --- |
| DK | x | --- |

⁴¹⁵ Source: <http://www.theguardian.com/books/2014/jun/13/self-publishing-boom-lifts-sales-18m-titles-300m>, visited on 17th April 2015.

⁴¹⁶ Wischenbart R. (2014), "Global eBook: A report on market trends and developments", Update Spring 2014, p.26.

⁴¹⁷ Wischenbart R. (2014), "Global eBook: A report on market trends and developments", Update Spring 2014, p.35.

⁴¹⁸ http://ec.europa.eu/research/innovation-union/index_en.cfm.

⁴¹⁹ TISP, <http://www.smartbook-tisp.eu/resources/ict-innovation-empowering-the-european-publishing-sector#>.

See: Footnote 1.

⁴²⁰ TISP, <http://www.smartbook-tisp.eu/resources/ict-innovation-empowering-the-european-publishing-sector#>.

See: Footnote 1.

A fixed book price agreement is a form of resale price maintenance (RPM) reached between publishers and booksellers, which set the prices at which books are sold to the public. As Poort explains,⁴²¹ there is a variety of cultural reasons to opt for fixed prices for books, such as the fear for 'fewer and less well-equipped bookshops' leading to more expensive books and fewer titles published (Dearnley and Feather 2002). Tangible representations are however scarce given that, as Canoy et al. (2006) observe, that governments do not want to tie themselves down to quantitative targets for introducing a fixed price in terms of the desired number of books published or the number of bookstores. Proponents of fixed book prices argue that such a mechanism enables publishers and booksellers to cross-subsidise low-selling but culturally important titles with the profits made on bestsellers. Arguments against a fixed retail price for books mostly originate from general competition policy. From a legal point of view, the table shows the different approaches adopted by the Member States under study. Further, it is worth pointing out those countries that have repealed the RPM laws they had previously enacted (e.g. UK).

3.3.2 Flow of rights and payments for authors of books

Authors of books are strongly dependent on the publishing sector for their income. It is useful to distinguish between primary sources of income, such as the ones arising from retailers selling a published version of the book written by the author and secondary sources of income that arise from uses of the work that are based on the primary product. Moreover, there are uses of one's work, such as copying, lending and reprography that are outside the control of both the author and the publisher and are motivated by external parties.

In terms of primary income, one has to separate the traditional publishing models to the more recently evolved self-publishing models. The traditional relationship between a book author and a publisher can be crucial, with the first "publishing contract" being one of the most important steps in a book author's career. The role of the publisher extends far beyond the literal meaning of the term, which is to make the book public. Depending on the publishing company in question, there is a range of value adding activities that can be offered from editing, producing, to distributing and promoting.

In return for these services, the publisher agrees a contract with the author regarding the transfer of rights and remuneration. This specifies the types of rights that are transferred or licensed by the author to the publisher, the types of services that will be offered to the author, the obligations of the author with respect to the publisher, the treatment of different modes of exploitations, the regions in which the book will be exploited and also the period that the contract will be covering.

While this process can be achieved by direct interaction between book authors and the publisher, there can be cases where an agent is also involved. As explored in the earlier description of the key players, agents, in return for a pre-agreed commission attempt to maximise the exposure of the authors and to secure, among other commercial opportunities, publishing deals for them. It should, however, be noted that they are not necessarily present in the value chain for book authors and they are often associated with more successful cases (this is why their involvement is represented with dotted arrows).

Income can also be generated for the authors, if a deal with secondary users is made to license exploitation of the book's contents for other purposes, such as using it as a base for a movie script. The specifics of such a deal would depend on the contractual terms between the book author and their publisher and would depend on whether such uses are specifically covered in the contract terms. Moreover, the secondary user does not necessarily need to

⁴²¹ J Poort and N van Eijk, 'Digital Fixation: The Law and Economics of a Fixed e-Book Price', International Journal of Cultural Policy, 2015.

interact with the author in order to obtain this licence as the publisher can also play this role (depending on their contractual terms with the author).

Other uses that can generate income for book authors, such as private copying levies, public readings, reprography and broadcasting can, in general, be under the remit of the CRMOs whose operational framework and scope of activity will vary significantly across countries.⁴²² Operationally, collective management can be either voluntary, in which case CRMOs set tariffs according to market conditions, or it can be non-voluntary in which case it occurs either through negotiations between market players (e.g. cable retransmission in the Netherlands) or through a statutory licence with tariffs being set either by law or through an administrative mechanism.

The types of players that would engage in these types of activities include libraries (primarily for reprography), educational institutions (educational recordings and reprography) other organisations such as law firms (e.g. for reprography), organisations that would organise public readings or book festivals and broadcasters.⁴²³

The figure below also explores some less mainstream aspects of the value chain. Firstly, larger publishers can cover distribution functions in-house but this is not necessarily the case for smaller players who might engage third-party distribution companies to facilitate this process; this is indicated with dotted arrows from the publisher to the distributors. An author can choose the alternative path of "self-publishing" where the traditional publisher is completely bypassed. In this case, aggregators and on-demand printers become necessary intermediaries.

Both aggregators and on-demand printers withhold a commission in exchange for their services. As they are both recent technological evolutions they are characterised by evolving and diversified business offerings. The general underlying principles are that they take a lower cut compared to traditional publishers and offer a narrower range of services. The most important area where they add value is in bringing the author's book in a format that can be used by the various players at the retail stage.

For instance, aggregators can bring an author's book manuscript to a format that is acceptable by iBooks and can thus enable access to digital book retailers.⁴²⁴ Alternatively, digital on-demand subscription services, like Oyster, can specify particular self-publishing vehicles, like Smashwords,⁴²⁵ as the unique channel through which self-publishing authors can access their platform. Authors following the self-publishing route could also hire the service of on-demand print companies that can help them access income streams related to physical copy sales without the need to go through a traditional publisher.

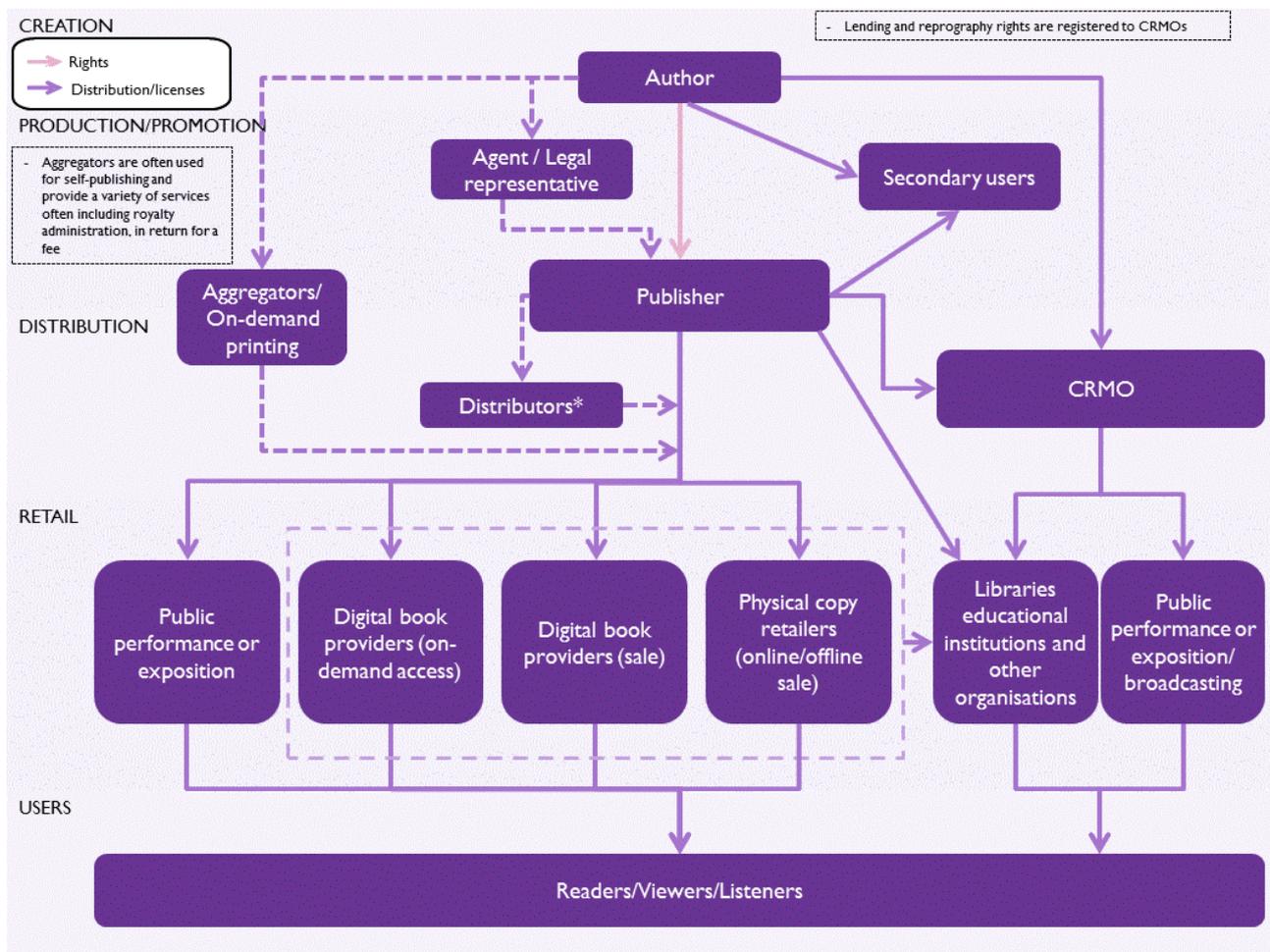
⁴²² CRMOs also operate for publishers under similar arrangements and this interaction is illustrated in the graphs for completeness. However, publishers' remuneration is not the focus of this study and is thus not explored further.

⁴²³ Libraries obtain remote e-book lending from publishers and can get copies of books (digital or physical) from the respective providers found within the dotted purple box on their left.

⁴²⁴ This could be considered as a basic service offering with more advanced options including services such as copyright administration.

⁴²⁵ Smashwords has a multi-purpose role for self-publishing covering both aggregation, distribution and retailing functions and is thus hard to represent diagrammatically.

Figure 3.2: Flow of rights, licences and distribution for authors of books



*Note: External distribution services can be used by publishers who do not have in-house capabilities.
Source: Europe Economics.

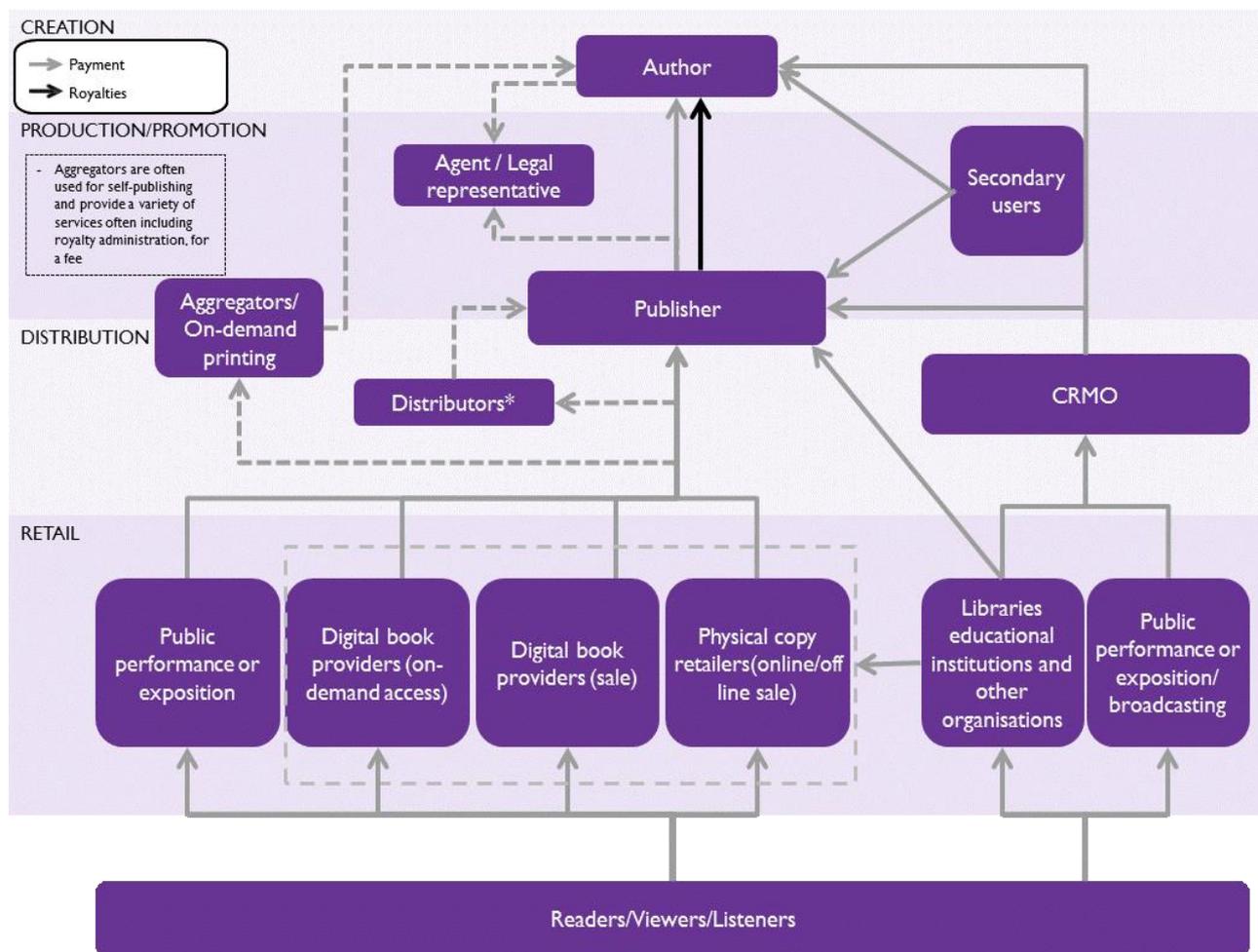
In Figure 3.3 we illustrate the flow of payments generated by the transfer or licensing of authors' rights and by the distribution of their work. The payment arrows going from end-users to the various players in the retail stage capture the various direct or indirect payments for books. Direct payments relate to the price paid for a book or an e-book while indirect payments refer to subscription fees for digital on-demand content, for libraries or educational institutions or other types of entrance fees charged to enter events such as literary festivals.

Publishers would then receive their respective, agreed share of the income from players at the retail stage, including libraries that would pay them in exchange for the hard copies or digital access that they purchased for their users. CRMOs would receive licence fees or compensation for uses such as reprography, cable re-transmission and public performances (as shown on the right hand side of the figure below) which would be distributed back to publishers and authors in the form of payments. Authors then would have to forego part of their income in order to compensate their agents.

The most significant source of income for a book author who uses a mainstream publishing channel is expected to be their contractual agreement with their publisher.

Other key players who are represented with dotted arrows, like the agent (who are not hired in all cases), aggregators and on-demand print companies (who are important for self-publishing) and distributors (who are important for smaller publishers, and in some self-publishing scenarios) receive their respective share of the income flow as determined by their business models and their agreements with other key players.

Figure 3.3: Flow of royalties and payments for authors of books



*Note: External distribution services can be used by publishers who do not have in-house capabilities.
Source: Europe Economics.

3.4 Authors of academic/scientific articles for journals

3.4.1 Evolution of the industry⁴²⁶

The environment in which authors of academic/scientific articles for journals operate is drastically different to that of book authors. There is usually no or little remuneration arising from their published work; some authors actually have to pay for their work to be published.⁴²⁷ Furthermore, there are restrictions in place by the various publishing entities as to whether an author’s articles can be deposited in free repositories or open access databases.⁴²⁸

⁴²⁶ This section is based on the information from the study “The oligopoly of Academic Publishers in the Digital Era” by Larivière, Haustein and Mongeon (2015).

⁴²⁷ Gasson C, “The economics of academic publishing”, <http://www.res.org.uk/view/art2Apr04Features2.html>.

⁴²⁸ The Budapest Open Access Initiative in 2001 defined open access of articles as freely availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. This concept will be analysed in further detail later in the paragraph.

In the early days, articles published in journals were printed on paper and distributed by postal services as the only means of communicating new ideas and research results among scholars. Academic authors looking for recognition among their peers submitted their articles free of charge to journals. The underlying motivation for free of charge submissions was the dissemination of knowledge and the establishment of academics as recognised experts in their fields; this motivation is still valid today. Other scholars, considered experts in their fields, volunteered to review and assess the submitted articles. Publishers then assumed the responsibility of distributing the journals back to universities and institutes.

The fundamentals of scholarly publishing between publishers and buyers, such as libraries, are very different from those observed in book publishing. Unlike usual suppliers, authors provide their goods without financial compensation. Academic libraries, regardless of their information needs, have to manage with less in case a price increase occurs. Due to the publisher's market power (as the top five most prolific publishers combined accounted for more than 50 per cent of all papers published up to 2013),⁴²⁹ the set of choices available to libraries is rather constrained; their constraints are exacerbated by the fact that in scholarly publishing each product has a unique value offering and cannot be replaced by substitutes.⁴³⁰

Moreover, the recent developments in the academic publishing sector have also affected its cost-structure. In general, scholarly publications can be considered information goods with high fixed and low variable costs. For academic journals in particular, fixed and "first-copy" costs comprise manuscript preparation, selection and reviewing as well as copy-editing and layout, writing of editorials, marketing, and salaries and rent, the two most substantial of which, manuscript writing and reviewing, are provided free of charge by the scholarly community. In that sense academic journals are an atypical information good, because publishers may neither pay the provider of the primary good (i.e. the authors of scholarly papers) nor for the quality control (i.e. the peer review). Variable costs are paid by the publisher and, as long as journals were printed and distributed physically, these costs were sizeable. However, with the advent of electronic publishing, these costs became negligible.

Additionally, the introduction of new electronic media and the internet gave birth to a movement led by academic authors and librarians, demanding open, unrestricted and free access to all peer-reviewed scholarly material. In fact, with academic research usually being publically funded (partly), the introduction of open access helps avoid situations where academic institutions pay twice for the academic research they have already funded. 431

The movement comprises two main currents. The first, known as the "golden" road to open access (OA), involves authors submitting directly to an OA journal. OA journals have existed since the late 80's and come in different forms:

- Fully-OA journals allow free online access to all published material without submission fees being charged to authors when handing in their manuscript.
- Hybrid OA journals may charge for an "OA option" or may limit online access to material and charge submission fees.
- Fee-based OA journals provide free OA, but often transfer the economic burden to authors through submission fees.

Gold open access usually refers to situations where published scientific works are freely available to the public on the journal's website. Usually an article processing charge (APC), which is included in the submission fee and varies considerably across publishers, has to be

⁴²⁹ Larivière V, Haustein S, Mongeon P, (2015), "The Oligopoly of Academic Publishers in the Digital Era".

⁴³⁰ Given the uniqueness of academic articles, they are products characterised by no or very low substitutability (i.e. it is difficult for libraries to find other articles, which focus on the exact same argument). Hence, libraries might be constrained in their choices.

⁴³¹ Odlyzko, A.M. (1999) "Competition and cooperation: Libraries and publishers in the transition to electronic scholarly journals" *Journal of Electronic Publishing* Vol 4, No 4, p163–185.

paid by the author if she wants her work published under golden open access. Nevertheless, such fees are, to a large extent, covered by the academic institutions employing the authors. The version of the work made available to the public is the final version held by publisher and is made available immediately on the website with no embargo periods. In this case, it is important to mention that the authors retain their copyright.

Self-archiving is the second alternative in the OA movement and is known as the “green” road to OA. It involves authors publishing in a traditional (usually non-OA) subscription journal but, at the same time, making their articles freely accessible online by either depositing them in an institutional online repository (IOR), like the ones established and maintained by many universities worldwide, or else in a subject-based repository such as arXiv. Usually this version is the author’s final pre-publication one (peer-reviewed, accepted manuscript) and it may be subject to an embargo period, depending on the publisher’s self-archiving policy.⁴³² In such cases, authors most commonly transfer their copyright to the publishers.

The current developments in the academic publishing industry highlight the central role that publishers play; with academic reputation primarily depending on the publisher, the most important choice an author can make is their publishing venue. If an author decides to go along the green road it is essential to choose a good repository, which offers good visibility. The more popular the repository is, the easiest it will be to find the work.⁴³³ In this respect, an increasingly important issue with repositories is the indexing and general search capabilities available to the users of these databases given the increasing amount of documents they contain.

3.4.2 Flow of rights and payments for authors of academic/scientific articles for journals

The figure below follows the same principles as in the case of book authors. The right hand side represents uses of the work that would be collectively managed by CRMOs, once the author has registered with them. In terms of primary distribution channels, the author’s most important counterparty will be the publisher, if one is involved. In the case of the green road, the publisher of the journal will in most cases be transferred the exclusive rights to the author’s work and, will also impose an embargo period during which the author cannot publish the article independently in freely accessible archives.

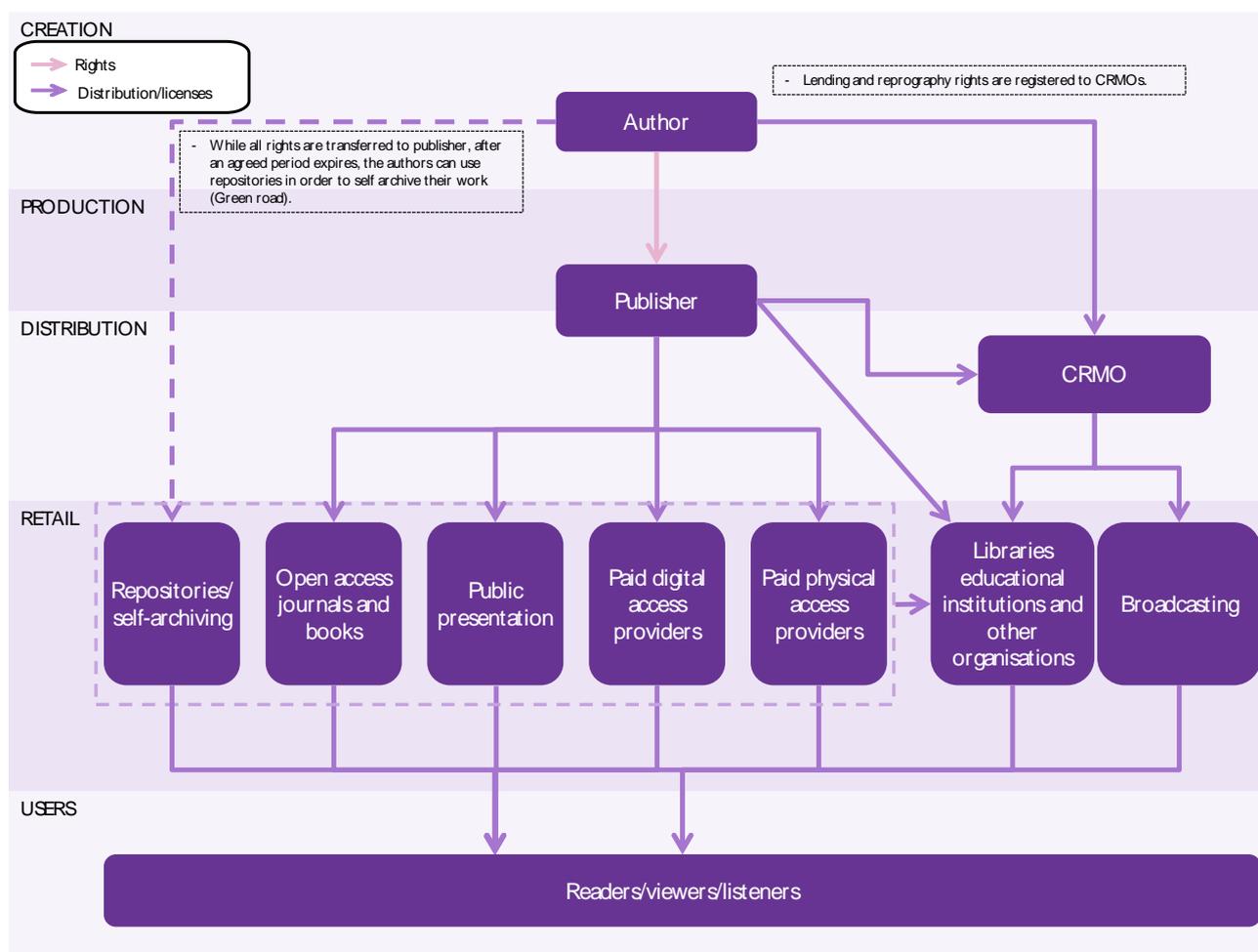
In the green road scenario, the dotted “distribution” line from the authors to the repositories represents their making their work freely accessible while the “rights” line represents their agreement with the publisher. In the case of “golden road” the interaction with the publisher (“rights” arrow) will lead (through a “distribution” arrow) to the author’s work being published in an open access journal database. When no open access is involved, then the interaction with the publisher (“rights” arrow) will lead to one of three access options for the reader:

- paid physical access;
- paid digital access; and
- access through a library or other educational organisation.

⁴³² Newcastle University, (2015), “What is the difference between Green and Gold Open Access?”, <http://www.ncl.ac.uk/openaccess/green-gold/>.

⁴³³ “Green OA vs. Gold OA. Which one to choose?” (2015), <http://openscience.com/green-oa-vs-gold-oa-which-one-to-choose/>.

Figure 3.4: Flow of rights, licences and distribution for authors of academic/scientific articles



Source: Europe Economics.

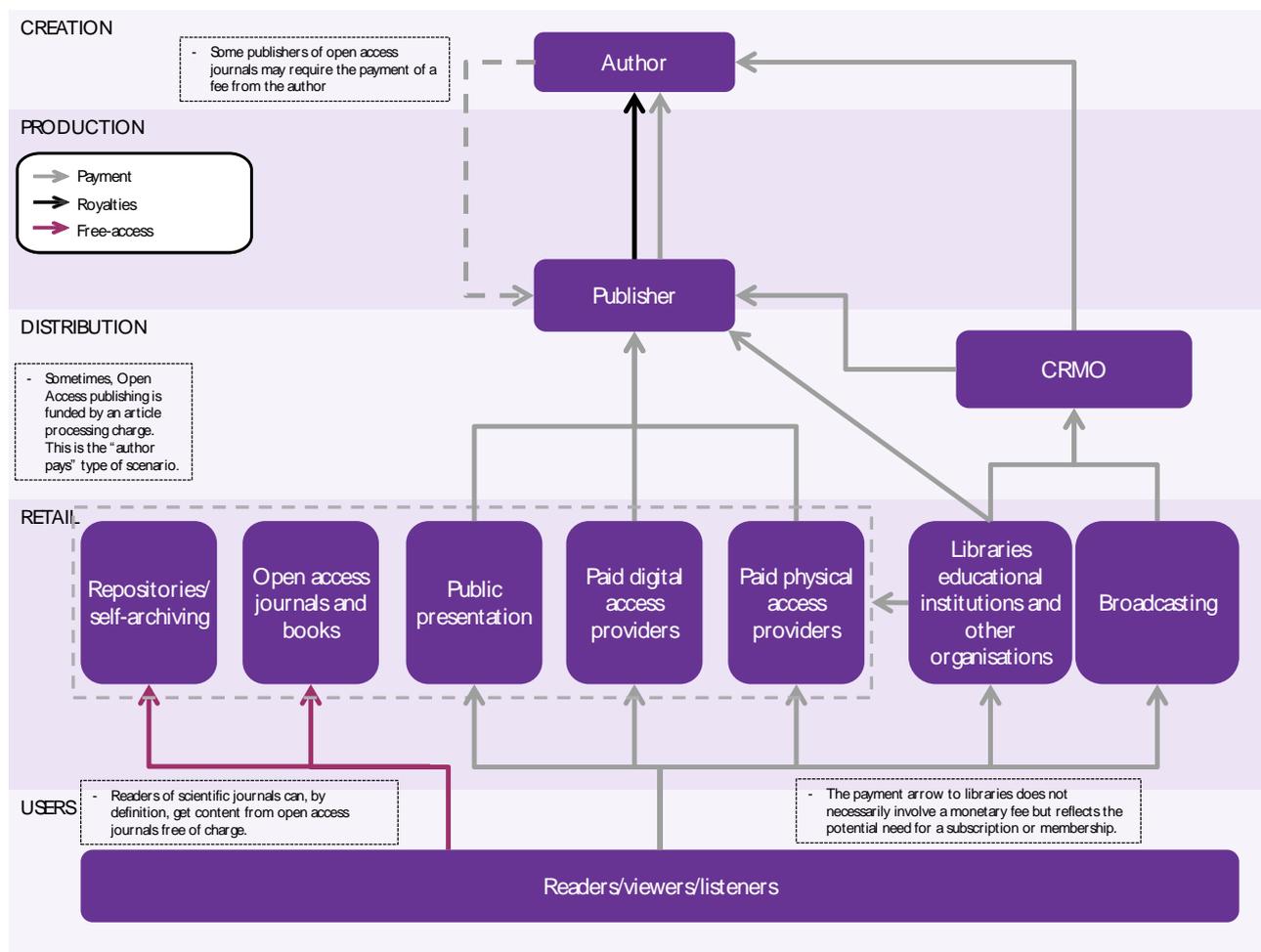
As explained earlier, the flow of payments for authors of academic/scientific articles is quite differentiated from the flows related to book authors. If the academic/scientific author receives any form of remuneration for their work this will be through either the publisher (though unlikely, it might be the case in traditional publishing) or the CRMO (in green road OA). The potential for publisher royalties will be specified in their contractual relationship while the potential income received from CRMOs will depend on their operating framework and market conditions.

The figure below introduces a distinct type of “payment” flow which is intended to cover free-access of material. This would happen when the author’s work is available on repositories or open access databases and will not generate any remuneration streams (implying no further arrows leading to the author).⁴³⁴ Potential for indirect benefits from the increased exposure of the author’s work through this free provision is outside the scope of this description.

Paid forms of access to journals (both online and physical) will generate income for the publishers and this is depicted through the arrows going from paid digital and physical access providers to the publishing entity. Authors could also, in some cases, receive income from presenting their research publications at conferences, seminars etc. (as indicated by the communication to the public boxes).

⁴³⁴ Arguably, the access of readers to libraries could be illustrated in the same manner but has been represented via a “payment” arrow in order to ensure consistency, even though no payment has to take place in many cases.

Figure 3.5: Flow of royalties and payments for authors of academic/scientific articles



Source: Europe Economics.

3.5 Journalists

Traditionally, the journalism industry is responsible for gathering, processing, and disseminating information related to the news. This information can be published via newspapers and magazines (print), television and radio (broadcast), and in modern times, through digital media in the form of websites and applications.

3.5.1 Evolution of the industry⁴³⁵

For a long time, printed newspapers and (later) printed magazines were the only media available to mass audiences. Between the two World Wars, radio became one of the most common domestic appliances and an important source for news broadcasts. After World War II, television developed into a mass medium and became another competitor for print publishers on the news market. Gradually television replaced newspapers as the most used source for daily news. In the early 2000 a number of publishers started to circulate free newspapers, in an attempt to win back some of the readers (and advertisers).

In response to increasing competition, newspaper publishers also introduced other innovations in their print product in order to make it more attractive for readers and advertisers; an

⁴³⁵ This section is based on information from the report "The newspaper publishing industry" published in 2012 by the European Commission.

example is the introduction of separate sections or magazines. Other examples are the transfer from broadsheet to tabloid, the introduction of Sunday newspapers in countries where these were not yet common and the launch of newspapers especially aimed at young people, often linked to major newspapers with which some of the content is shared, such as Der Spiegel in Germany or NRC Next in the Netherlands. Furthermore, newspaper publishers have tried to create more loyal readership by offering additional services for readers and subscribers such as reductions in the sale of books, records and travel arrangements.

Since its establishment, the internet offered a new platform for news publishing. Newspapers started offering their news online, reprinting original content from the paper and adding related (multimedia) content and published new content as well (for example continuing updates of news stories). Newspaper publishers have not only used the internet as a new platform for publishing news, but have also used internet tools such as email and RSS to alert people to news. By providing RSS feeds to their websites, news publishers enable users to automatically keep up-to-date with new articles on their website. This has, on the one hand, facilitated the news consumption process, but on the other hand it has paved the way for aggregation websites like Google News and applications like Flipboard, Pulse, Zite and Instapaper to aggregate and display content, thereby attracting readers away from their own websites.

Traditional news providers have increased their utilisation of the internet and social media by, among other things, adding blogs and video to their websites. Blogs increased in popularity in the mid-2000s as columnists and reporters set up personal blogs and news organisations began hosting blogs by members of the public or linking to popular blogs in their coverage areas.

However, there still are differences between the online services of traditional newspapers and the 'new', internet-only, news providers (or 'pure internet players'). Whereas most traditional news providers can be characterised as providers of mainstream, professionally produced news with some additional options for user interaction, many 'new' news publishers' websites are predominantly designed as a platform where non-professionals are the main contributors and where users share or discuss news. Examples are news sites such as the Huffington Post where celebrities but also ordinary users contribute blogs and which provide ample space for user comments to the news. Other examples are the French Rue89 and Mediapart, or the popular Dutch news site NU.nl.

The advent of smart phones and tablets has also transformed the industry by expanding the possible ways in which news could be accessed and presented. Moreover, the existence of such devices has given rise to new business models with users being able to purchase a subscription, or buy single copies of the digital version of magazines or newspapers. Some of the recently surfacing business models offer extended functionalities (e.g. Flipboard, Zite and Pulse) such as the creation of personalised, social magazines for users' electronic devices.

Social networks like Facebook and Twitter have expanded publishers' and broadcasters' capabilities to disseminate news and information in a direct and quick manner. In the case of Facebook, striking an agreement with publishers involved prolonged negotiations. Eventually it was agreed that news publishers can either sell and embed advertisements in the articles, keeping all of the revenue, or allow Facebook to sell ads, with the social network getting 30 percent of the proceeds. Facebook is also permitting the news companies to collect data about the people reading the articles with the same tools they use to track visitors to their own sites.⁴³⁶ As a result, social media are currently being used by many journalists as a source of information and a means to contact sources.

⁴³⁶ New York Times (2015) "Facebook begins testing instant articles from news publishers" available at: http://www.nytimes.com/2015/05/13/technology/facebook-media-venture-to-include-nbc-buzzfeed-and-new-york-times.html?_r=0.

According to the Association of European Journalists, key challenges facing the journalism industry today include:⁴³⁷

- Declining budgets, jobs and news titles across Europe.
- The increasing importance of technology and the costs associated with adapting to the use of such technologies.
- Growth in the use of online resources such as social media and search engines.

After many years of double-digit annual increases in online advertising revenue, the trend tapered off dramatically in 2008 and 2009, with online revenues flat or even decreasing.⁴³⁸ Recent research from PwC shows that the share of online revenues both for newspaper and magazine publisher has significantly increased from 2010 to 2015, compared to the share of print revenues.⁴³⁹ PwC also forecasts that the share of online revenues will grow considerably until 2019 and they will contribute to reverse the descending trend of revenues in the publishing sector.⁴⁴⁰ Moreover, there exists support for the view that the proportion of freelance journalists will increase significantly primarily driven by the reduction of permanent staff members experienced by major news publishing companies.⁴⁴¹

A highly contentious issue exacerbated by the advent of new technologies is that of news aggregation. Many European publishers have recently blamed news aggregators for using their copyright-protected content without any corresponding payment that would allow sharing of the revenues stemming from such content. In fact several of these news aggregators, in particular Google News, have been under the spotlight in European countries such as Spain, Germany, France or Belgium. Firstly, in August 2013, German press publishers had already tried to make Google News pay for their products.⁴⁴² More recently, in November 2014, Spain approved the new Intellectual Property Law, which lays down an exception to the publishers' rights for the purposes of news aggregation. This exception is subject to compensation, which cannot be waived and is collectively-managed.⁴⁴³ This development led Google to close down its news service in Spain.⁴⁴⁴ The German attempt actually backfired as the traffic to publishers' websites sharply declined, causing the German news consortium VG Media to declare that without their reinstatement some of its members were on a path to bankruptcy.⁴⁴⁵ Some countries' publishers, such as France, reached agreements with Google,⁴⁴⁶ whereas in Belgium Google was forbidden to distribute written stories and photographs created by some media

⁴³⁷ Association of European Journalists (2015) "EU strategy for independent and sustainable media" Euractiv, 29 Jan 2015.

⁴³⁸ KDMC UC Berkeley Graduate School of Journalism <http://multimedia.journalism.berkeley.edu/tutorials/digital-transform>.

⁴³⁹ PwC, "Global entertainment and media outlook 2015-2019" available here (for magazine publishing): <http://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/2015/magazine-publishing-key-insights-2-consumer-magazine-revenue.pdf> and here (for newspaper publishing): <http://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/2015/newspaper-publishing-key-insights-3-paywalls.pdf>.

⁴⁴⁰ PwC, "Global entertainment and media outlook 2015-2019" available here (for magazine publishing): <http://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/2015/magazine-publishing-key-insights-2-consumer-magazine-revenue.pdf> and here (for newspaper publishing): <http://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/2015/newspaper-publishing-key-insights-3-paywalls.pdf>.

⁴⁴¹ Bittner A, (2011), "Managing change, innovation and trade unionism in the news industry".

⁴⁴² German publishers vs. Google, <http://www.dw.de/german-publishers-vs-google/a-18030444>.

⁴⁴³ Under Spain's 'Google Fee' law, news aggregators must pay publishers, <http://www.washingtonpost.com/news/business/wp/2014/07/25/under-spains-google-fee-law-news-aggregators-must-pay-publishers/>.

⁴⁴⁴ Under Spain's 'Google Fee' law, news aggregators must pay publishers, <http://www.washingtonpost.com/news/business/wp/2014/07/25/under-spains-google-fee-law-news-aggregators-must-pay-publishers/>.

⁴⁴⁵ German publishers vs. Google, <http://www.dw.de/german-publishers-vs-google/a-18030444>.

⁴⁴⁶ <http://www.theguardian.com/technology/2013/feb/01/google-52m-fund-help-french-publishers>.

companies.⁴⁴⁷ As a result of these challenges and the resulting court cases, the use of newspaper articles by news aggregators in France and Belgium is now licensed by CRMOs. Given the different evolutions in Europe, the issue remains open and contentious.

The digital era has also had a pronounced influence on radio and television journalists, challenging the way these professions operate and changing their fundamentals.

For several years now, radio networks have offered internet services. Content has become progressively enriched, and internet users find news that is complementary to broadcast material on radio stations' websites. Radio has also become increasingly videoed, with cameras being increasingly installed in studios, making it possible to 'watch' certain radio programmes on the internet. Thanks to the creation of web sites, it has become possible to listen to a radio station outside one's actual geographical location at the time.

Furthermore, at certain radio stations, the listener is omnipresent online; stations have developed an interactive presence online through the interactivity of the internet, linking with social media and permitting exchanges between listeners, who can give their opinions and ask their own questions to organisers. Radio reportage itself has changed, with the emergence of new technologies. New competencies are needed by radio journalists: being able to take photos or shoot videos, knowing how to complement one's own reports in text form, knowing how to put all this on line etc. Such abilities have become essential in order to secure employment opportunities, just as much as being able to write for radio and to do voice-work.

Television, on the other hand, only began more or less simultaneously in European countries in the 1950s, though it was pervasive within a decade of its introduction. In some countries, its organisation remained closely aligned to the state (e.g. in France), whereas in the Eastern Bloc it was (like radio) even entirely state-controlled. A number of Western European countries followed the model of the BBC and offered diverse forms of television as a "public service", including the Scandinavian countries, Germany, Austria, Switzerland, and Italy.

Television Journalism also entailed the use of moving images to convey information, thus requiring new formats to be developed or those of newsreels and the radio to be adapted, including live broadcasts, news programs, news magazines, documentaries, interviews, talk shows, etc. As the audio-visual medium involves highly complex production techniques, other professional roles were now required (cameraman, editor, etc.) along with the actual journalistic component. In "public-service" television, journalists were largely independent, despite corporate control, and free from the pressure of viewer ratings and audience preferences. Due to new transmission technologies (cable, satellite), this changed in the 1980s, when private-sector broadcasting was also authorised in Western Europe.

Television journalists have also faced major challenges. Video news is replacing text-based news as the main source of information for many people. Text, video, and audio sources are increasingly integrated in storytelling, and search engines based on visual matching rather than textual tags are becoming more refined. Visual literacy is important for journalists, and better understanding and use of images as carriers of information is needed. Digital interaction with visual storytelling is critical, both to engage viewers and to complement the reception of the visual message with self-reflexivity by the reader/viewer. Connected TV is the next step in the full integration of television, Internet, and mobile phones.

Television and radio journalists are directly affected by the broadcasting market. On the one hand, as far as radio broadcasting is concerned, public service providers are more popular and hold a bigger share of the market in countries such as Denmark, France, Germany, Ireland and the United Kingdom. On the other hand, in countries such as Italy and Poland, private stations

⁴⁴⁷ <http://arstechnica.com/tech-policy/2011/07/google-versus-belgium-who-is-winning-nobody/>.

have larger shares compared to their public competitors. Particular trends which have affected the considered countries are:⁴⁴⁸

- Increasing commercial radio revenues up to 2008, followed by sharp declines from 2009, particularly in countries such as Italy, Poland and the United Kingdom.
- Severe competition among radio stations in order to gain particular shares of the market, especially in Hungary and the Netherlands.
- Concentration movement of radios under the influence of big audio-visual groups, especially in France.

For television broadcasters the situation is slightly more homogeneous across Europe; in most countries explored in this study the market is characterized by duopolies or even monopolies, as in the case of Ireland. France and the Netherlands represent an exception as the market is characterised by new dynamic players which recently entered the market thanks to technology improvements and new regulations.

Similarly, the Dutch television broadcasting landscape is characterised by a large number of players. Specifically, television viewers in the Netherlands can choose between more than thirty channels corresponding to public, private, German, US-based and Belgian broadcasters. This plurality of broadcasters is, to a large extent, facilitated by Dutch media law preventing the government from intervening in the functioning of the television broadcasting market. Within this context, public broadcasters are not directly operated by the government who installed a Media Commission (Commissariaat voor de Media) to regulate broadcasting, including the regulation of commercial broadcasters with a Dutch license.⁴⁴⁹

3.5.2 Flow of rights and payments for print journalists

The newspaper or magazine publisher plays a very important role for print journalists, similarly to authors of books and journals. A freelance journalist writing an article will have an agreement in place with a publisher outlining the specifics regarding the use of her work as well as any entitlements to remuneration that her work may create. This relationship is represented with a “rights” arrow and represents both licensing and the transfer of rights. Journalists under an employment contract are more likely to be employed under a full transfer of rights agreement.⁴⁵⁰ In the Netherlands, there is even a presumption that the fictive author is, *ad initium*, the employer.

On the other hand, journalists and publishers will give a mandate to CROs, by registering with them, to grant licences for certain rights and collectively manage their remuneration rights in relation to their work. In contrast to book authors, the extent of development of the framework governing CRO involvement related to journalists differs by country. In some cases it is at an earlier stage, whereas in some other cases it is at a more mature state.

As an example, Newspaper Licensing Agency (NLA) in the UK only started to collect magazine royalties on behalf of publishers in October 2013. This is further complicated by the fact that a piece of journalists’ work can be used in a variety of publications with each one of them having different stakeholders involved (e.g. magazines, newspapers or web journalism).⁴⁵¹ In contrast, in Belgium, the Société de droit d’auteur des journalistes (SAJ) has been established since 1998 and is responsible for adequately collecting the fees accruing to its members.⁴⁵²

⁴⁴⁸ European Journalism Centre, Media Landscape, http://ejc.net/media_landscapes.

⁴⁴⁹ European Journalism Centre, Media Landscape, http://ejc.net/media_landscapes.

⁴⁵⁰ For reasons explained in the introduction a full analysis of full-time employed journalists is outside the scope of this study.

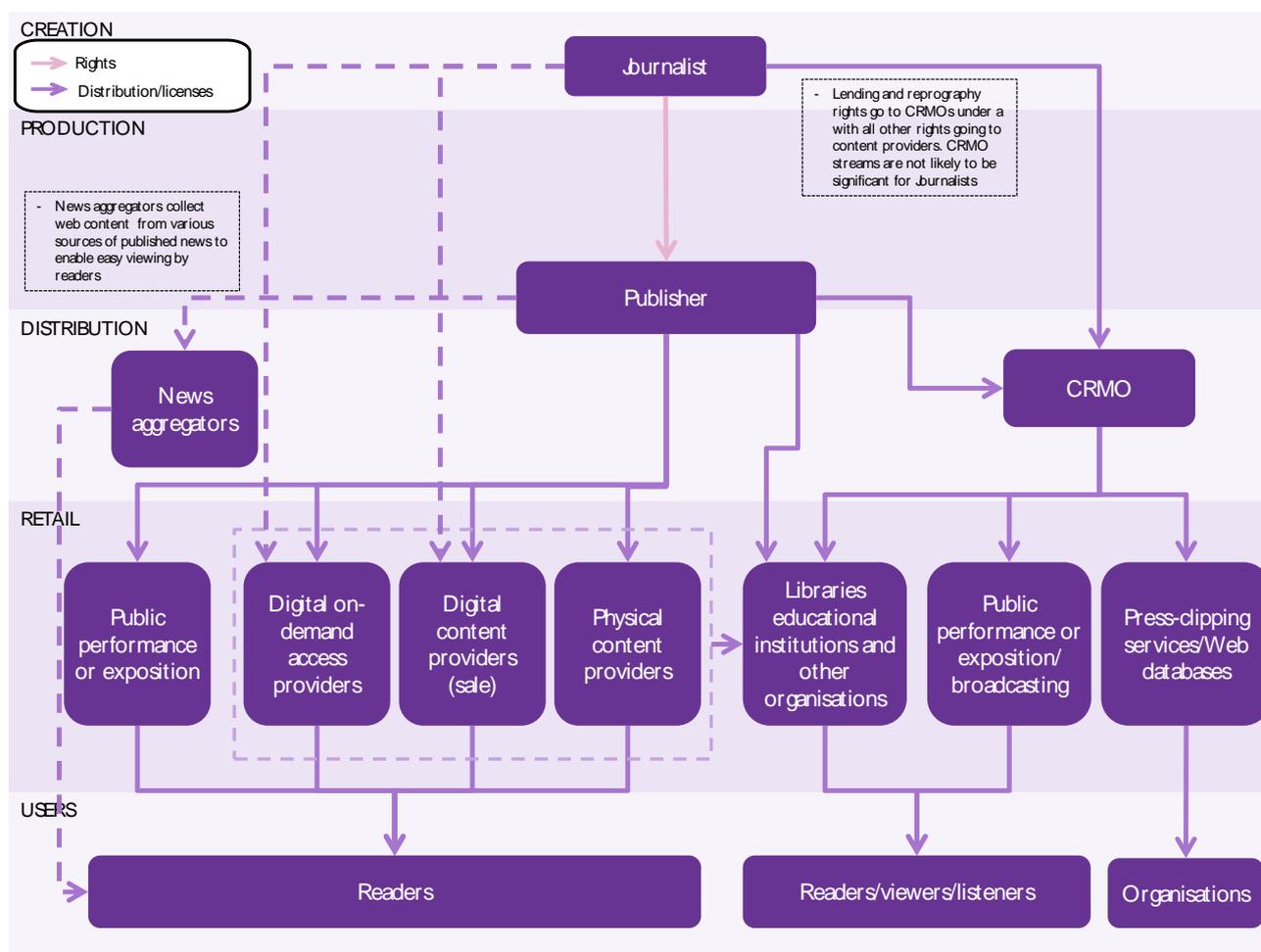
⁴⁵¹ Uses of a journalists work under this category are covered by the “public exposition” box which is intended to cover all possible alternatives.

⁴⁵² See e.g. <http://www.saj.be/missions/>.

The dotted purple line going from the journalist to both digital on-demand access providers and sale providers reflects the possibility that journalists could follow a non-mainstream channel, bypassing the publisher, to distribute their articles and obtain an alternative source of income. This type of development is facilitated by technological progress and by the variety of online platforms that exist for the consumers of journalists' work. News aggregators would operate by aggregating news from a variety of different publishing sources which would then be accessed by readers. They have been represented using dotted distribution lines as their presence in their supply chain is contentious as far as authors' and publishers' rights are involved and their role could potentially change.

Libraries can also be a place where readers can access a journalist's work. In order for them to provide access to, or a physical copy of, the work, they may need to obtain a licence or a copy from either the publisher or through the traditional retail channels (e.g. a library subscription in a newspaper's paid-for portal).

Figure 3.6: Flow of rights, licences and distribution for print journalists



Source: Europe Economics.

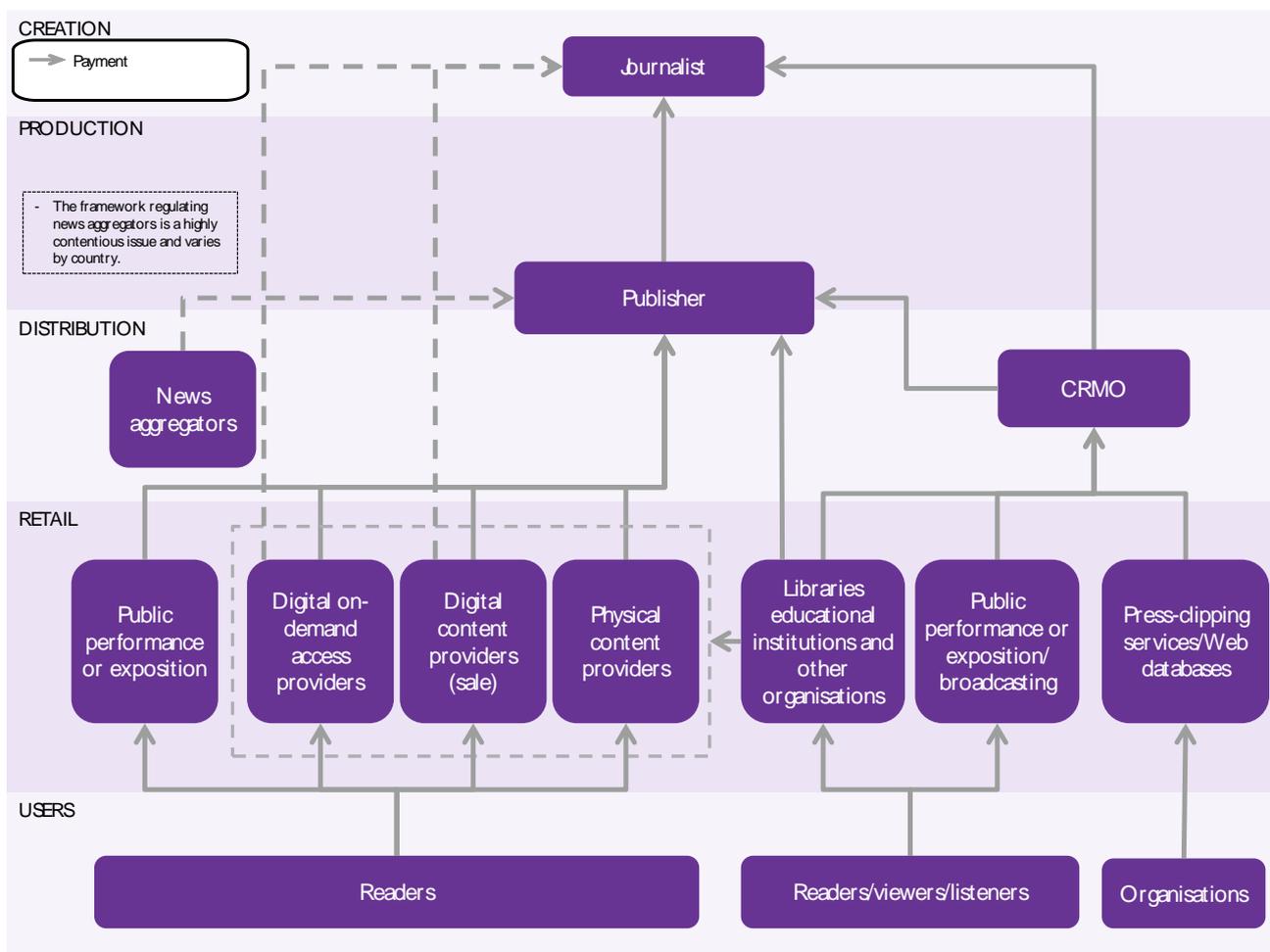
As can be observed in Figure 3.7, journalists may receive income from three sources. The first income source, represented by the grey arrow flowing from publishers to journalists, corresponds to newspaper or magazine publishers. Journalists authorise such entities to use their work as per their contractual agreement (either by a rights transfer or by licensing them).⁴⁵³

⁴⁵³ According to a survey conducted by the Authors' Copyright and Licensing Society in the UK regarding freelance newspaper and magazine journalists in 2014, of those journalists that had signed a contract with publishers 49 per cent of freelance newspaper journalists and 35 per cent of freelance

This income source is highly dependent on the income received by the publisher from all the different sources at the retail level. Apart from the mainstream channels publishers may use to generate revenue from journalists' works, such as physical content providers, expositions or libraries, technological progress has facilitated the emergence of a variety of online platforms, such as digital on-demand and sales providers, that may result in additional income ultimately being directed to journalists.

The second income source for journalists comes from their CRMOs, represented by a grey arrow reflecting payments. CRMOs are responsible for collectively managed uses of journalists' works, while their framework and type differ by country. Lastly, journalists may choose to self-publish their material online, as represented by the dotted payment arrow flowing from digital content providers to the journalist. Such arrangements vary by the business model used.⁴⁵⁴

Figure 3.7: Flow of payments for print journalists



Source: Europe Economics.

magazine journalists retained their copyright. The majority of freelance journalists surveyed, however, had not signed a contract for their commissioned work in the first place which means that publishers only acquired the right to publish the work while the copyright remained with the journalist. Source: <http://www.alcs.co.uk/Documents/a-free-for-all.aspx>, p5.

⁴⁵⁴ For example, while many online content providers still compensate authors with a fixed amount for each work, some operate on a "pay-per-view" basis in which authors are compensated an incremental amount for each view their work generates. See e.g. <http://ajr.org/2014/03/27/pay-per-visit-debate-chasing-viral-traffic-hurting-journalism/>.

3.5.3 Flow of rights and payments for audio-visual journalists

Audio-visual journalists interact principally with TV and radio broadcasters. They may produce work on an independent basis and later sell it to broadcasters or may work on a commission basis for the broadcaster. They may alternatively be directly employed by the broadcaster.

Instead of producing work for the broadcaster directly, audio-visual journalists may instead interact with press agencies. As with the broadcaster relationship, this could be on a direct employment basis, on a commission basis, or by independently selling pre-produced work. These agencies could be either large international press agencies, such as Reuters and Agence France-Presse, or local/regional press agencies.

There are several ways in which end users can consume a broadcaster's content. This could be through directly watching the live broadcast on television, or through online services such as TV catch-up, VOD or simulcasting delivered via digital downloads or streaming. These services may be funded by subscription fees, advertisement or public funds (e.g. licence fees). In the case of public service broadcasters (such as the BBC, ITV, Channel 4 and Channel 5 in the UK) online services are funded either solely by licence fees (as is the case with the BBC's domestic content) or through a combination of licence fees and the inclusion of advertising content (as is the case with ITV). For subscription based broadcasters, such as Sky, users pay a periodic subscription fee in exchange for the right to consume their broadcasting services.

Denmark, Sweden and Norway are the only European countries with a similar model regarding public broadcasters, whereas other European countries, such as France, Italy and Germany, also have a TV licence fee but in those cases the public broadcaster is also funded to some degree by advertising.⁴⁵⁵ The Dutch public broadcaster is financed largely directly through the State budget and by advertising.

In Croatia and the Czech Republic, public broadcasting is funded primarily from monthly broadcast user fees while in Romania, such fees are collected through electricity bills. Polish public broadcasting on the other hand is characterised as being of semi-commercial nature resulting in a relatively low TV licence fee.⁴⁵⁶

As well as providing audio-visual news content to broadcasters, press agencies may also provide audio-visual news content direct to the market if they have the capabilities of doing so. This is most likely to be the case for large press agencies, such as Reuters, which have their own in-house broadcasting services.

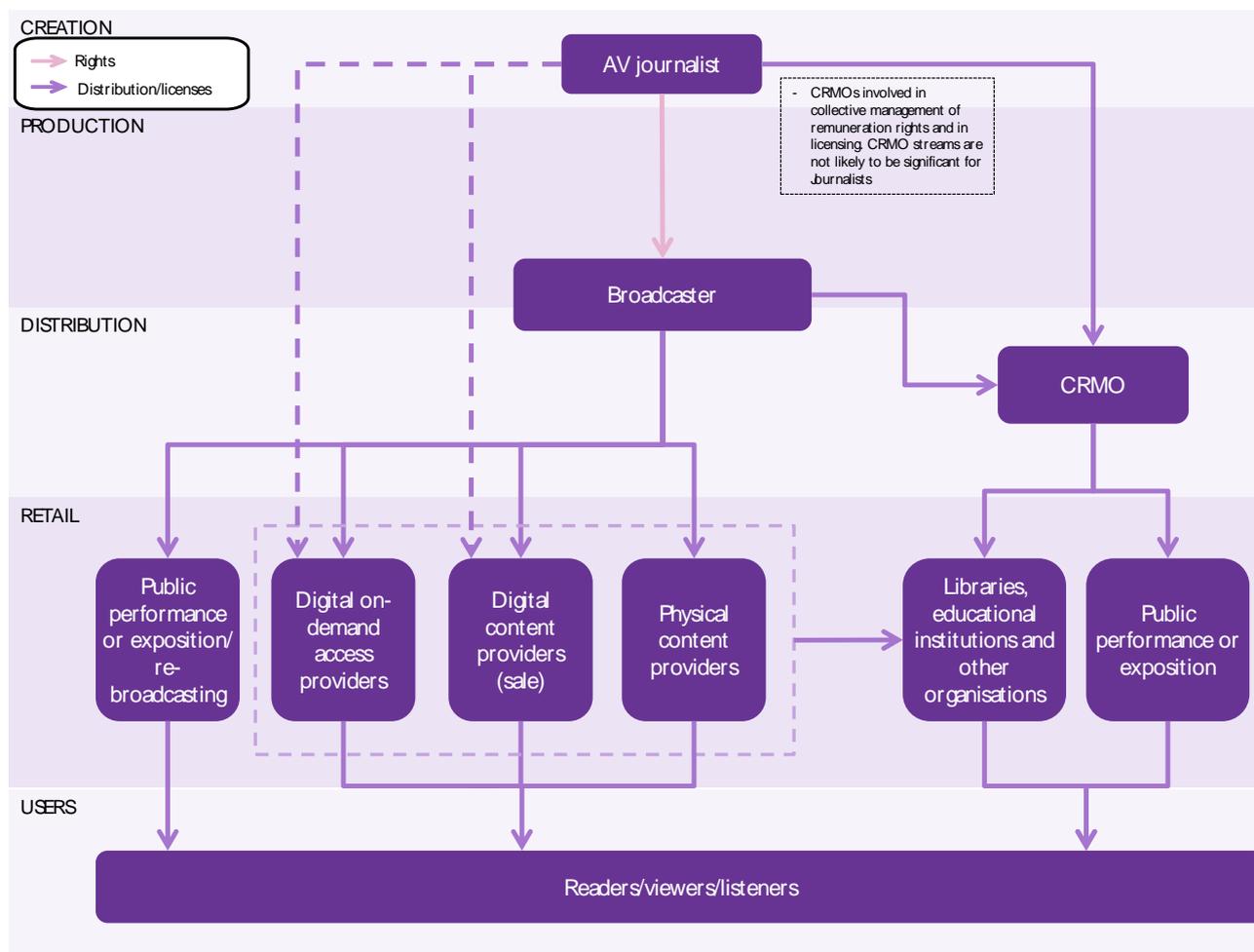
Journalists and broadcasters can register with CRMOs, to grant licences for certain rights and collectively manage their remuneration rights in relation to their work. Uses of audio-visual journalists' work that can fall under collective management include the copying of recordings to mediums such as DVDs (private copy) and the cable-retransmission right provided that the right has not been previously transferred to the producer. In some countries, collective management is also responsible for licensing for educational uses (e.g. Germany, the Netherlands).

Libraries and other organisations can obtain physical or digital copies of the journalist's work or can subscribe to various services, as illustrated by the arrow between retailers and libraries et al.

⁴⁵⁵ "How is TV funded around the world?" 2014, <http://www.bbc.co.uk/news/entertainment-arts-26546570>.

⁴⁵⁶ "How is TV funded around the world?" 2014, <http://www.bbc.co.uk/news/entertainment-arts-26546570>.

Figure 3.8: Flow of rights, licences and distribution for audio-visual journalists

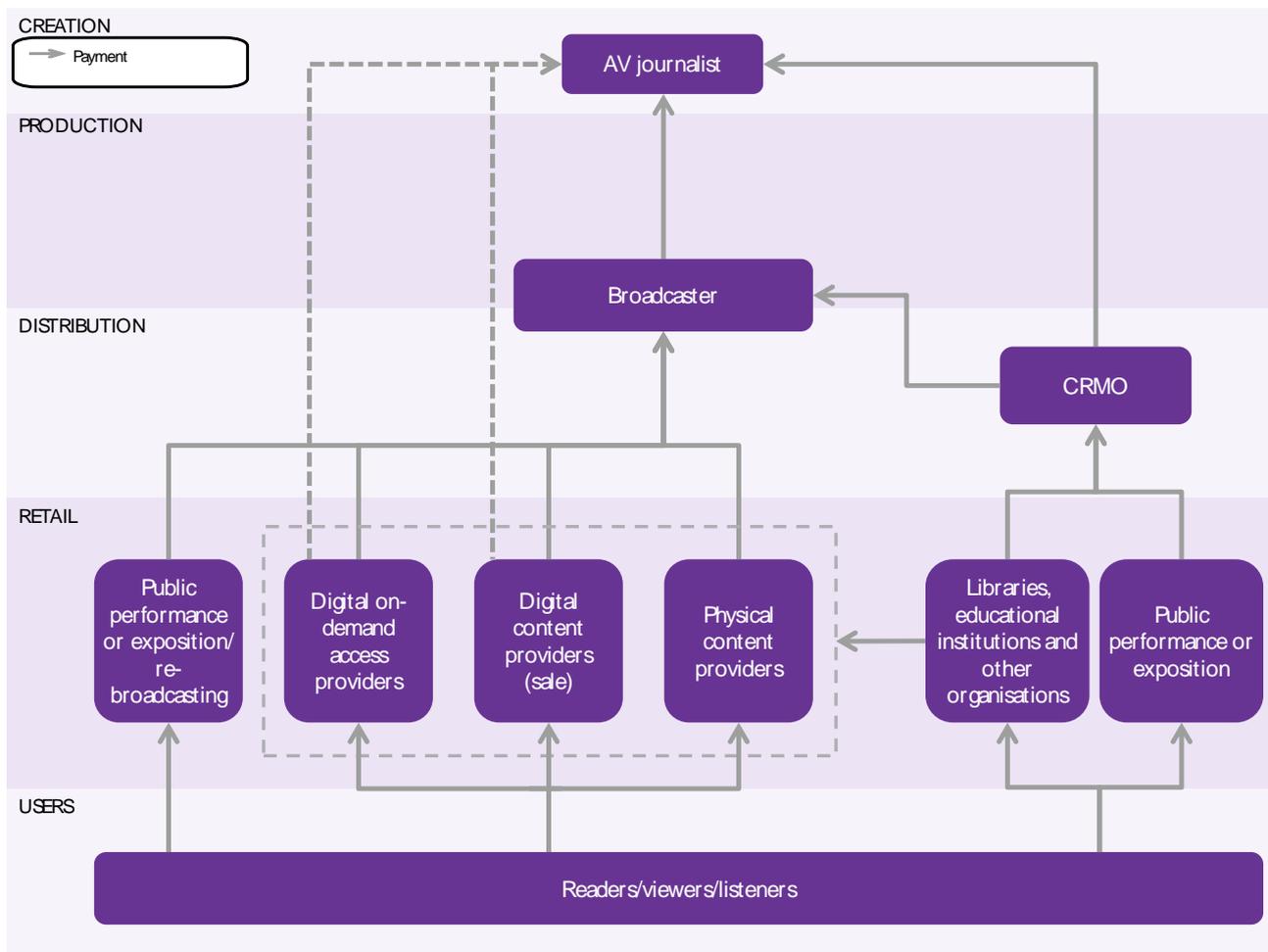


Source: Europe Economics.

There are two principal remuneration channels available to audio-visual journalists:

- Income from broadcasters, the structure of which will depend on whether the AV journalist is directly employed, a freelancer working on commission or an independent seller of pre-produced audio-visual content. In the case of a freelancer working on commission, pay will usually be in the form of a one-off fee and, as such, there are unlikely to be royalties paid based on the success of the work. The level of broadcasters' income will depend on the level of demand for the retailers' content by consumers as well as institutions such as libraries.
- Income in the form of periodic fee payments from CRMOs, which is funded by the monies collected by the CRMOs.

Figure 3.9: Flow of payments for audio-visual journalists



Source: Europe Economics.

3.6 Translators

Translation is commonly known as "the process of translating words or text from one language into another". More precisely, it refers to the communication of the meaning of a word or text from a source-language into a target-language.

The industry generally depends on authors of the original work, publishers, producers and broadcasters because translation works are infringing if they are not created with the permission of the copyright holder.

3.6.1 Evolution of the industry

Several industry commentators say that industry has witnessed strong growth in spite of the global recession, with the strong growth driven by the forces of globalisation. As companies have become more global in reach, there has been a growing demand for multilingual marketing campaigns in order to better benefit from this increasingly diverse customer base. Migration into Europe is another factor which has helped to drive translation services within the EU. The question is whether, and if so to what extent, the growth of the translation industry had benefitted the (traditional) translator.

The latest major EC report on the state of EU translation industry came in 2012 – “The status of the translation profession in the European Union”.⁴⁵⁷ Most estimates provided in this study are based on meta-analysis of existing surveys. Based on this meta-analysis the report finds that approximately three-quarters of individuals in the European translation industry work on a freelance basis, or between 50 and 90 per cent depending on the country and sector in question. This is a proportion which, according to the EC’s report, has grown since the 1990s, as an increasing number of large companies have looked to outsource their required translation services. A further observation is that for many individuals translation is seen as a secondary or occasional occupation, with 60 per cent of people working on a part-time basis. A study by Katan (2009), for example, based on a global survey of over 1,000 translators, found that over two-thirds had a second role, while there were very few for whom translation was their sole role.⁴⁵⁸

Other interesting findings from the EC’s report are that over 70 per cent of individuals working in the translation industry are female (again based on a weighted average of earlier findings) and that annual incomes vary widely, with some individuals earning less than €6,000 per annum and a small minority earning as much as €90,000 per annum. A survey conducted by the Chartered Institute of Linguists and the Institute of Translation and Interpreting (both UK associations) found, in a sample of 1,350 translators and interpreters, that for 59 per cent translation was not the only, or main, source of household income.⁴⁵⁹

In this section we consider both literary translators and audio-visual translators. We consider the impact of digitisation on each of these groups in turn.

Literary translators are involved in the translation of poems, fiction and non-fiction books, educational books and textbooks, books for children and young adults, academic/technical books, newspaper/magazine articles and advertising/commercial translations.

With technological advances in the way literary content is created, distributed, and accessed, translators have had to adapt to the rise of new machine-aided business models in order to be more efficient. Computer-assisted translation (CAT), also called “computer-aided translation”, “machine-aided human translation” (MAHT) and “interactive translation,” is a form of translation wherein a human translator creates a target text with the assistance of a computer program. CAT relies on a database with correspondences between a source document (in the source language) and its translation (in the target language), which have been verified by the human translator. When translating a new text, CAT will cut the source text into much small pieces of text, which it then looks to match with existing source-target pairs from the database. If a match is found this will be suggested to the human translator, who may then accept, modify or reject this suggestion. Once the translation is complete, the source and target texts are fed into the database, such that the number of source-target pairs in the database continues to grow. In this way, the effectiveness of CAT should improve over time as the database on which it is run continues to grow.

Another translation tool, which may be considered to pose more of a threat to the jobs of human translators, is machine translation (MT). This tool relies on statistical techniques to identify more sophisticated patterns of words in existing texts translated by humans, i.e. it does not purely rely on linguistic rules, but makes educated guesses of the best translation based on the frequency of a given translation for a given word or phrase. As a result, MTs are reliant on a large database of pre-existing human translations to improve the robustness of the

⁴⁵⁷ EC DG Translation, “Studies on translation and multilingualism – The Status of the Translation Profession in the European Union”. 7/2012, DGT/2011/TST.

⁴⁵⁸ Katan, David. 2009. “Translation theory and professional practice: a global survey of the great divide”. *Hermes* 42: 111-154.

⁴⁵⁹ CIOL/ITI. 2011. 2011 Rates and Salaries Survey for Translators and Interpreters. Chartered Institute of Linguistics and Institute of Translation and Interpreting.

statistical technique. This means that MTs, like CATs, depend on the availability of human translators to analyse the massive amounts of text for accuracy.⁴⁶⁰

Audio-visual translation covers the translation of works by dubbing, voice-overs and intra- and inter-lingual subtitling. Dubbing is the most popular, although more expensive translation form.⁴⁶¹ Germany, Spain, France and Italy are well known for having traditionally chosen to adopt dubbing as their main means of translation. They have a well-established and active dubbing industry with recognisable voice actors who are often each paired with one dubber for the duration of the actor's career. In the rest of Western Europe, voice-overs are mainly used in non-fictional genres, such as interviews, documentaries and current affairs programmes. Movies distributed in theatres are typically subtitled. In some countries such as the Netherlands, Denmark, Norway, Sweden, or Finland, dubbing is only done for works that are intended for children who are too young to read the subtitles fluently, while everything else is available with subtitles only.⁴⁶²

As a sector, audio-visual translations bring together diverse disciplines including film studies, semiotics, applied linguistics, cognitive psychology and ICT.⁴⁶³ The discipline remains essentially European, and is too often limited to case studies on the linguistic side only. In recent years however, audio-visual translation has gained increasing recognition through the development of research interests at world universities such as Surrey University and University College London where Masters Programmes have been established in the field. Support also arises from institutional commitment, especially the need for intra-lingual subtitling for the deaf and hard of hearing.⁴⁶⁴

3.6.2 Flow of rights and payments for literary translators

The case of translators is unique in that it is dependent upon an original copyrighted work of another author, and as such the translator must ensure that the original author has granted permission before starting such work. In practice, the translation of a literary work is generally arranged directly between literary translator and the publisher who wishes to publish a translated work, once that publisher has obtained the translation rights either from the author directly or from the publisher of the original work (if the original publisher purchased the translation rights from the author).

In many cases the publisher of the original work and the publisher of the translated work will be different, as, for example, a publisher based in the UK is unlikely to have the contacts, retail relationships, marketing power etc. to publish a successful German translation of the work – a publisher based in Germany would be much better placed in this regard, and is likely to achieve the same outcome for much lower cost. Therefore, original publishers who obtain translation rights from the original author will usually look to sell these translation rights to publishers in other countries. A contract between the two publishers usually specifies an advance to be paid by the translation publisher to the original publisher, as well as a royalty percentage to be paid to the original publisher based on sales of the translated work. This royalty percentage tends to be quite low, as the translation publisher is taking on substantial work to produce, market and distribute a translated work and in doing so is also bearing the risk of whether or not the translated work shares the same success as the original.

⁴⁶⁰ EC DG Translation, "Studies on translation and multilingualism - Translation and intellectual property rights", DGT/2013/TIPRs.

⁴⁶¹ Dubbing vs. subtitling Francesca Riggio Industry Focus, www.multilingual.com.

⁴⁶² Piotr Kuhiwczak and Karin Littau, 2007, A companion to translation studies.

⁴⁶³ Laura Incalcaterra, 2011, Audiovisual Translation Subtitles and Subtitling Theory and Practice, Mcloughlin.

⁴⁶⁴ Yves Gambier, 2006, Multimodality and Audiovisual Translation, EU-High-Level Scientific Conference Series MuTra 2006 – Audiovisual Translation Scenarios: Conference Proceedings © Copyright 2006-2007.

It is rare for an agreement to be made directly between the original author of a book and a translator, as under these circumstances there would be no guarantee that the finished translation would be published. That said, the growing amount of self-publishing has increased opportunities for translators to work directly with authors, and the translators could in turn self-publish the translated work. Translators may also make use of aggregators in the same way as original authors in order to publish translated works in electronic formats. This is not represented in Figure 3.10 because we do not see it, at least at the moment, as a common distribution channel for translators, although this may change if the self-publishing route continues to grow in popularity.

Generally, the translator and book publisher will sign a contract which specifies how the translator is required to undertake the translation of the original work, and which will also specify how the publisher is able to exploit the rights in the translation. As well as publication and distribution rights, the publisher may also receive a range of broader exploitation rights, such as the right to reproduce part of the translation in an anthology, newspaper or magazine, the right to present the translation in part on radio or television, and the right to adapt the translation for a variety of audio-visual productions. Some of the rights may be passed on to third-party exploiters if the publishers do not have the capabilities to exploit all of the rights granted in house.

In some cases the translator may make use of a translation agency as an intermediary between themselves and the publisher. In such cases, the translation agency will take a contractually agreed share of the flow of payments from the publisher to the translator. In return for a contractually agreed share of payments, translation agencies can improve opportunities to individual translators, as publishers and other relevant bodies benefit from the increased exposure and accreditation that the translation agency provides.

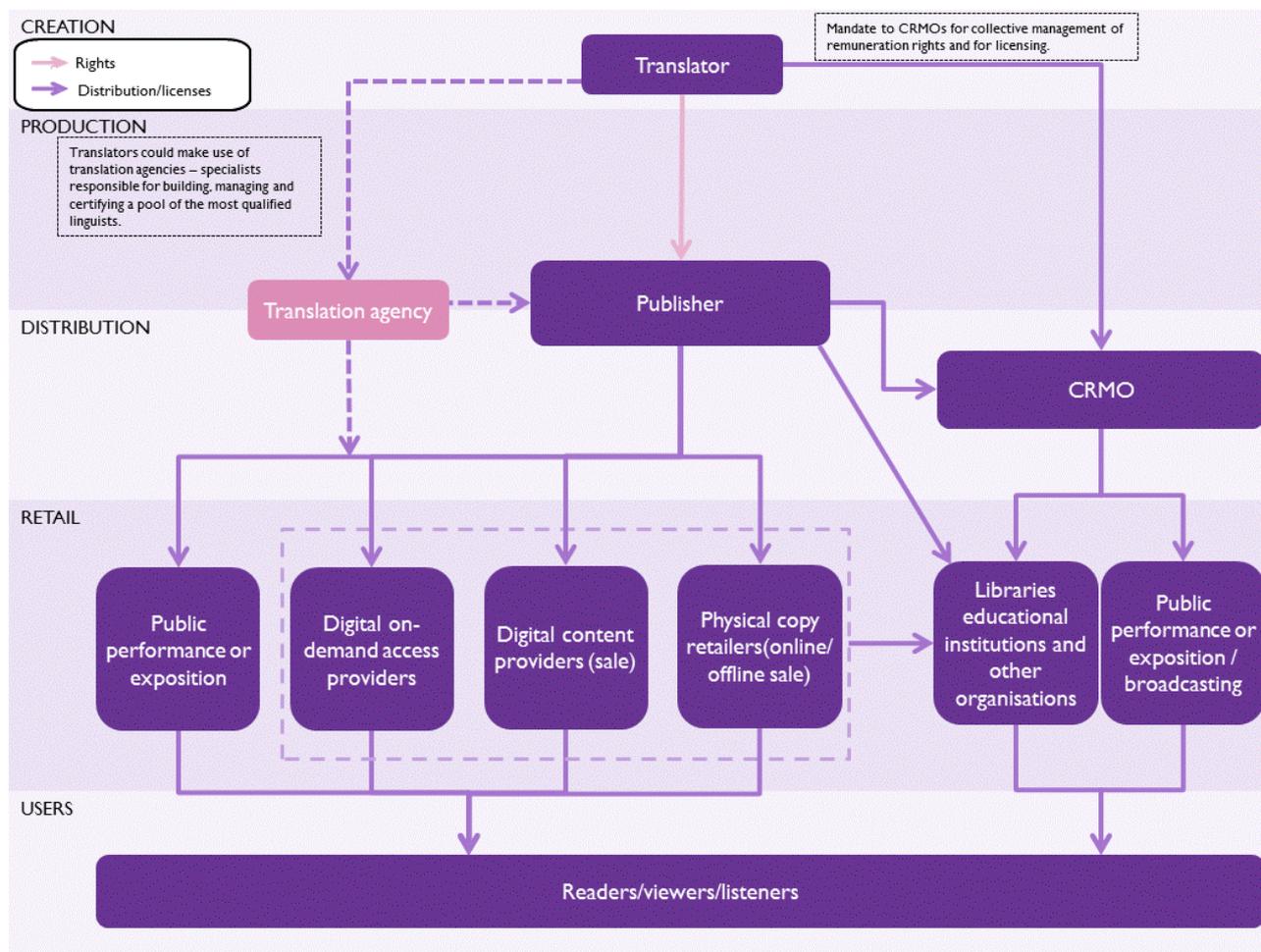
As in previous cases, publishers can distribute the work through a number of channels, namely: physical copy providers; digital copy providers (sale or on-demand access); and direct communication to the public (offline). Libraries and other organisations can obtain their copies of, or access to, translated works either from the publishers directly or through the standard retail channels.

Retail clients may also approach translation agencies to get a freelance translation with agencies offering more reliability than the alternative of approaching individual translators.

Translation agencies are a preferable route for retail clients seeking translations into multiple languages as, rather than approaching several individual translators with expertise in different languages, a single translation agency can be approached to manage the entire process (including the process of assigning relevant translators to undertake each language translation).

As far as CRMOs are concerned, a number of translators' rights (reproduction, communication to the public and distribution) are usually transferred to the publisher who pays translators the contractually agreed remuneration (either lump sum, royalty or a combination); other rights, like the lending right, are administered by a CRMO, while the fair compensation paid by users for acts of reprography or private copying is collected by a CRMO and distributed according to a distribution key.

Figure 3.10: Flow of rights, licences and distribution for literary translators



Source: Europe Economics.

The flow of payments from the user to retail level is equivalent to that for the 'authors of books' described earlier, i.e. retailers make money through a combination of direct sales and subscription fees for on-demand use. Money at the retail level then flows back as fees to translation agencies and publishers, the former where the retail client is paying for the translation to be undertaken itself and the latter where the retail client is paying to attain copies of the already translated work from the publisher.

Publishers may also earn income from libraries for supplying them with copies of demanded work. At the same time, libraries may obtain the work from standard retail channels, in which case the income will flow through them before reaching the publisher.

The publisher usually pays the translator an advance to produce the translated work, given that the production of a translated work can be a very time-consuming process. The publisher may also agree a royalty fee with the translator, which the translator will gain from only once the royalty payments are in excess of the initial advance. So, for example, if the initial advance were €1,000 and a royalty of 5 per cent on a translated work of €10 were agreed then the translator would only receive additional benefit from the royalty agreement once in excess of 2,000 books ($2,000 \times 10 \times 0.05 = 1,000$) have been sold.

The royalties for a translator are likely to differ compared to the royalties for the author of an original work. Some of the factors creating this differential include:

- the publisher responsible for the translated work is also likely to be paying some royalty back to the original publisher and/or author;
- the size of the corresponding markets; and

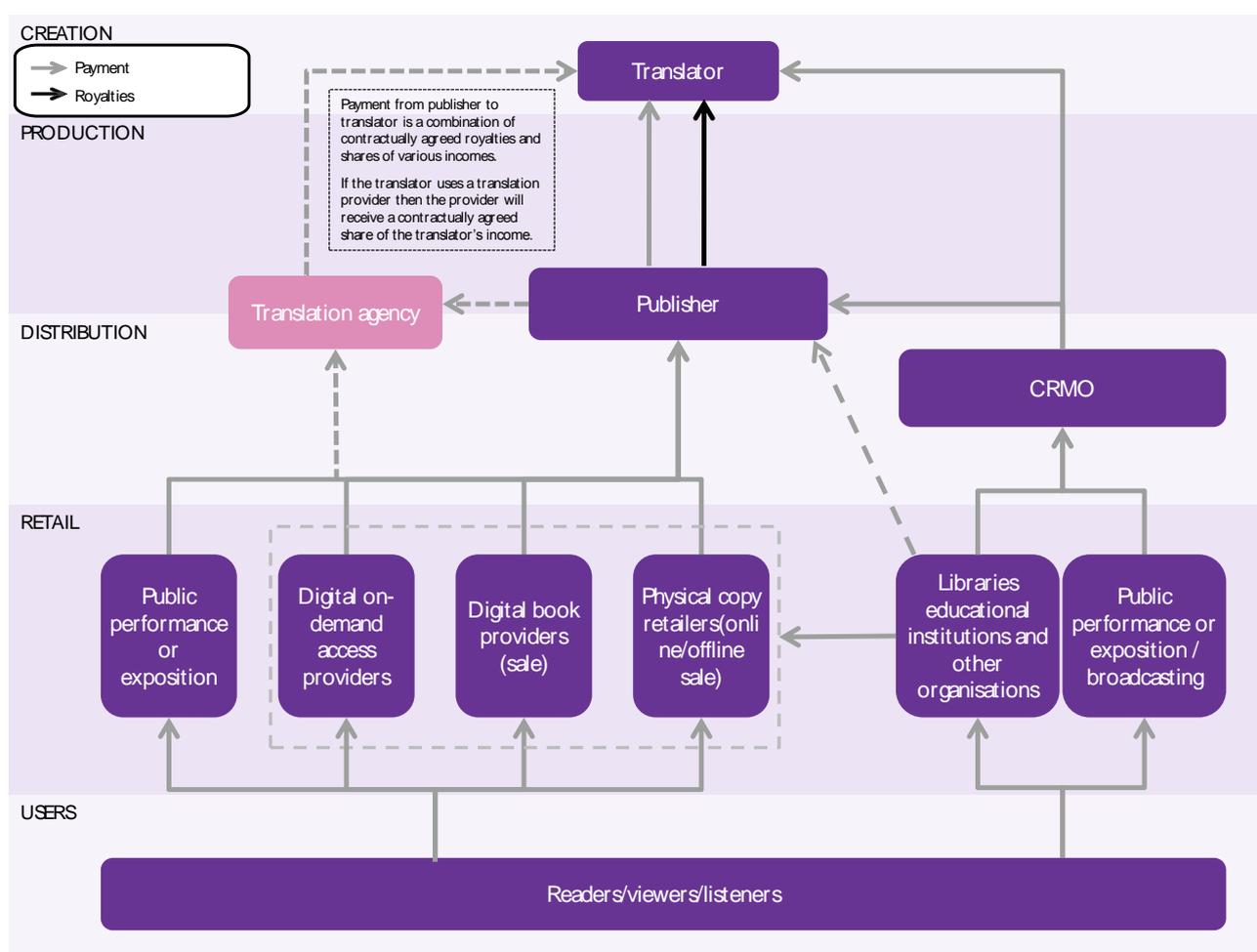
- competition differentials in the translators market compared to the authors' market.

If the translator were to operate through a translation agency then the translation agency would take some contractually agreed share of the translator's income from the publisher or retail client. This may be some combination of a fixed advance and a proportion of any royalties earned.

In the alternative model of direct interaction between author and translator the remuneration would be shared between the translator and the author, foregoing remuneration flows to both the publisher of the translated work and the publisher of the original work (assuming, as is often the case, that they are two distinct publishers).

As described earlier in this section CRMOs can be involved in the supply chain in several different ways with resulting remuneration flows depending on each country's framework.

Figure 3.11: Flow of royalties and payments for literary translators



Source: Europe Economics.

3.6.3 Flow of rights and payments for audio-visual translators

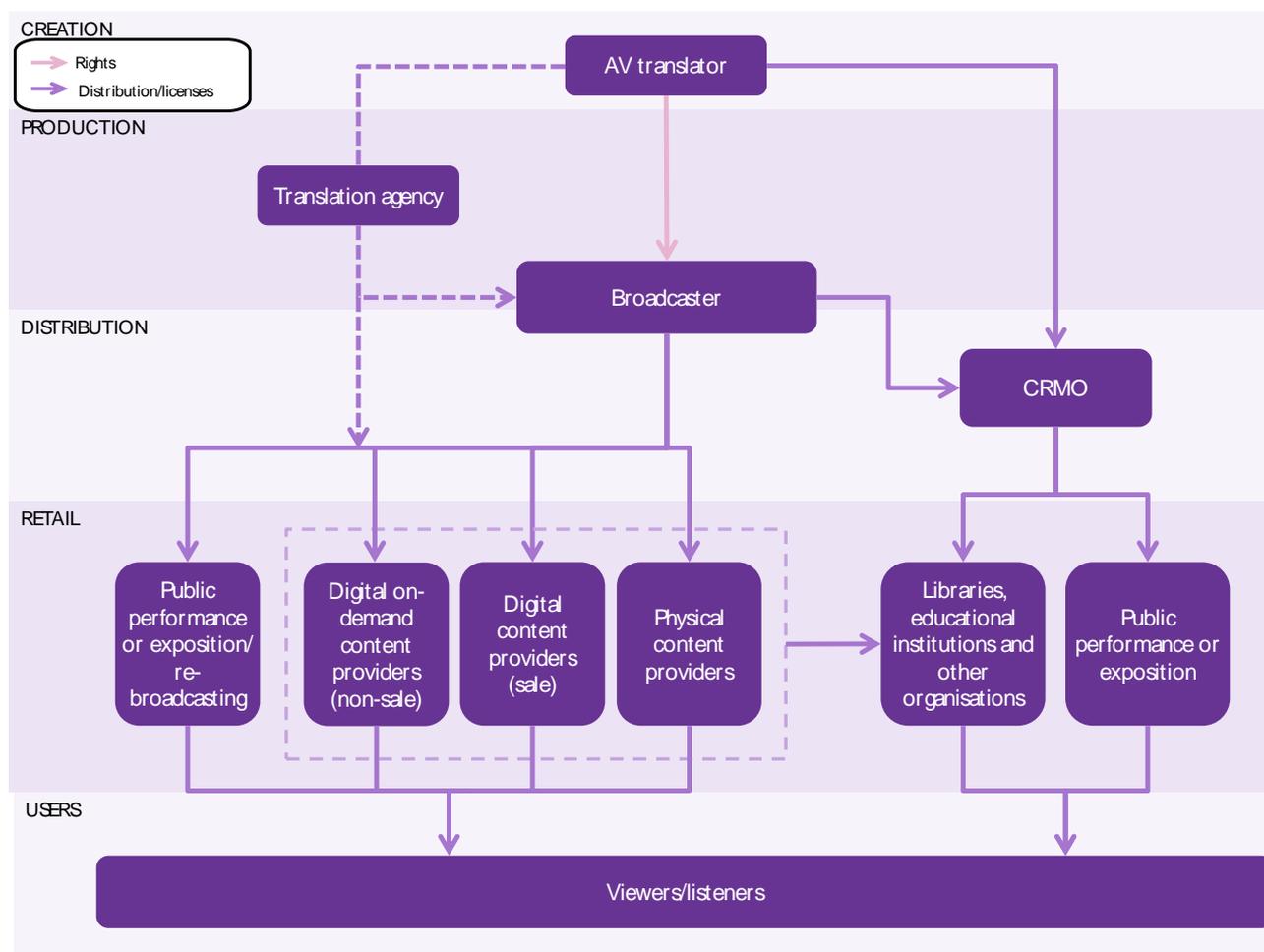
There has been a large growth in demand for audio-visual translators as the digital breakthrough has resulted in an ever growing number of television channels for which translation work, such as dubbing and subtitling, is required.

Audio-visual translators face similar distribution pathways: they can, like a literary translator, operate through a translation agency which, in exchange for a contractually agreed share of income, provides credibility and increased marketing power; and/or they can produce work

directly for a broadcaster or producer (equivalent to a literary translator working directly for the publisher).

The translation agencies tend to be specific to the audio-visual market (i.e. not the same as the literary translation agencies), some of which may be nation specific and others which may be more international in scope. The agencies may employ translators directly or commission work from translators. There is competition among agencies to provide cheaper audio-visual translation services to broadcasters, producers and smaller clients at the retail level.

Figure 3.12: Flow of rights, licences and distribution for audio-visual translators



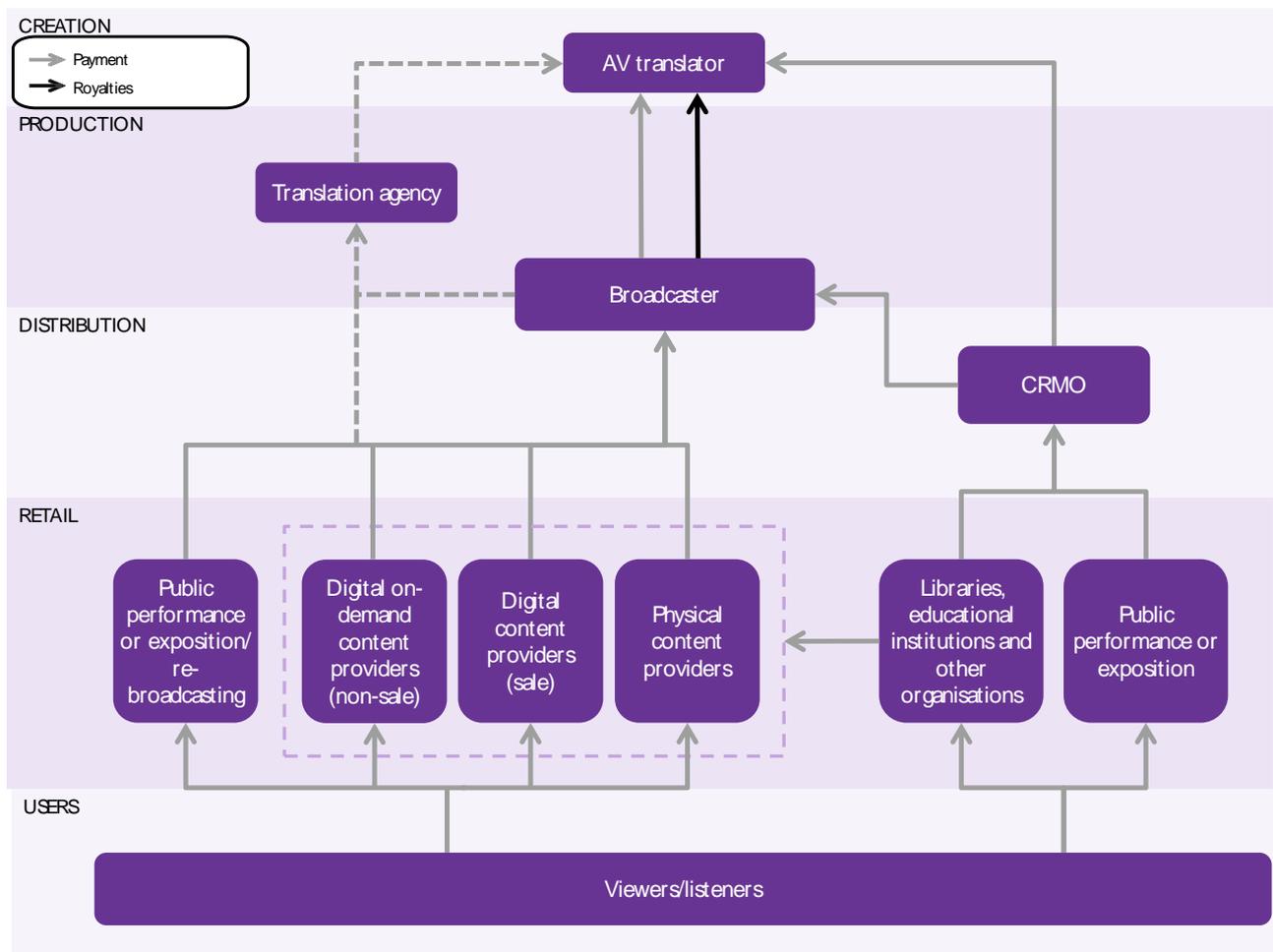
Source: Europe Economics.

Audio-visual translators can earn income from the broadcaster/producer, which may be some combination of a fixed fee and a small royalty percentage, or may be exclusively a fixed fee for undertaking the translation.

Another source of income is represented by the translation agency, which will, in return for the marketing, accreditation and other services provided, take a contractually agreed share of the income earned from the broadcaster/producer/retailer in question if the translator is working on a commission basis. (Other audio-visual translators may be employed by the agencies).

A third source of income may be provided by broadcasters, in the form of fees, for other uses of their translation work. In the case of audio-visual translation work, this is most likely to be through licences paid for rebroadcasting rights.

Figure 3.13: Flow of royalties and payments for audio-visual translators



Source: Europe Economics.

3.7 Visual artists

The three types of visual artists we considered are:

- Photographers (covering advertising photographers, newspaper/magazine photographers, product photographers, web photographers and print media photographers).
- Illustrators (covering advertising illustrators, newspaper/magazine illustrators, product illustrators, web illustrators and print media illustrators).
- Designers (covering advertising designers, newspaper/magazine designers, product designers, web designers and print media designers).

Both graphic designers and illustrators do visual work, but the essential difference is that a graphic designer works on structure design and an illustrator does more drawing. Graphic designers are often employed by companies to provide a coherent visual message for an ad campaign or to help a company develop a visual brand identity. Their work can include, for instance, website design, product packaging and creation of a logo. Illustrators can do commercial work for companies, designing for example product packaging book illustrations, graphic novels and company logos.

On a freelance basis, there are two key ways in which visual artists can exploit their work. Firstly, they can distribute their work through intermediate suppliers who license the use of pre-produced visual content to exploiters for specific purposes. Secondly, they can transfer rights directly to visual art exploiters, including publishers, advertising agencies and press

agencies, who prepare the visual content for use in a wider work, e.g. a series of illustrations for a children's book or a photograph of live sporting event for inclusion in a newspaper article. The use of one distribution channel may not preclude the use of another: in some circumstances the visual art exploiters may commission work from the visual artists directly, while in other cases the visual art exploiters may obtain pre-produced work from stock agencies to which the visual artists contribute. There are therefore three key players in the industry value chain: the visual artists (photographers, illustrators and designers); the visual art exploiters (principally publishers, press agencies and advertising agencies); and the intermediate suppliers who engage in the commercial trade of usage rights in exchange for a contractually agreed share of the royalty payments.

3.7.1 Recent industry trends

As with the publishing sector more broadly, the visual arts industry has undergone a significant transformation in recent years due to the development of the Internet and the digitisation of the visual arts industry.

Visual artists traditionally operated independently or through boutique agencies. Each of these boutique agencies would tend to have a particular subject speciality and, therefore, sellers and buyers of visual arts may have had to approach several different agencies in order to meet their requirements. The process was, of course, considerably time intensive as well, because visual art purchasers would have to search through physical archives to identify relevant material – again, perhaps not just at the premises of one visual art agency, but potentially several.

The proliferation of the Internet, CD-ROMs and the digitisation of collections, however, has changed this picture markedly. Visual art collections became accessible and licensable through the Internet, and stock agencies began the process of digitising old collections to also make them available for online distribution. This process of digitisation and online accessibility and licensing also drove widespread consolidation in the visual arts stock agencies, through an intense programme of mergers and acquisitions. This consolidation process has led to a small number of global leaders in visual arts stock, covering a diverse range of subject matters, unlike the traditional subject-specific boutique agencies. Getty Images was the pioneer of online stock collections and online commerce and also pursued an extensive acquisition programme, buying up numerous small, privately-owned agencies that constituted the traditional visual arts stock market, digitising their collections and adding them to their growing online resource stock.

There have been some key developments in the visual arts industry over the last few years:

- The development and expansion of the microstock industry.
- The proliferation of royalty-free content.
- The growth of photography cooperatives.

These developments have all been, to varying degrees, driven by the development of the Internet and the digitisation of the visual arts industry, and in that sense should not be considered as mutually exclusive. The proliferation of royalty-free content has, for example, received an additional impetus from the development of the microstock industry, in which content is always licenced on a royalty-free basis. We consider each of these three developments in turn.

Microstock agencies

A significant recent development in the visual arts industry has been the evolution of microstock photography agencies over the last decade, or so. These differ to standard stock visual arts agencies in that:

- They accept content from a much broader range of sources, including amateurs and hobbyists. Microstock agencies tend to publicly invite contributions to their collection, while more traditional stock agencies tend to limit which visual artists can sell through them, as well as what they can sell.
- They sell low priced royalty-free content which attracts custom from individuals and small businesses who cannot afford the higher prices of standard stock agencies. The emphasis is on low prices in exchange for ease and speed of use, with the aim of attracting content from those for whom visual art is, perhaps, seen as a secondary income source or simply a hobby.

Royalty-free content

Traditionally, visual arts content was available on a rights-managed basis, which involves visual art being licensed to users on the basis of its usage. However, since the 1980s royalty-free content has witnessed growing popularity, a rise which has in part been attributed to the growth of CD-ROMs in the late 1980s and early 1990s, and more recently to the development and expansion of microstock agencies discussed above. It provides straightforward and quick access to stock visual content at low prices and thereby has improved access to the stock visual content market for small business and private individuals.

Photography cooperatives

The industry has also seen an increasing number of photographers turn to photography cooperatives. This has been driven by an increasingly harsh environment for individual freelance photographers. The growing pressures include: increasing costs (including the costs of relevant IT hardware and software associated with industry digitisation); falling traditional revenue streams⁴⁶⁵ (in part driven by the growth in microstock photography discussed above); and growth in the sheer volume of stock imagery available from a myriad of online sources. Photography cooperatives allow photographers to work together and pool expertise in creative direction, production and branding, as well as pooling high fixed and overhead costs, associated with equipment and software investment and maintenance, marketing, sales, distribution and administration. The focus of photography cooperatives varies: some may exclusively focus on sharing ideas and creative direction; some may focus on sharing fixed and overhead expenditure; and others still may offer support in all of these areas.

Although precise models of remuneration may differ, the general approach of a photography cooperative is: firstly, for all commissioned work and stock sales to be billed through the cooperative; secondly, for the photography cooperative to take a margin of incoming revenues in order to cover all common costs of the cooperative, e.g. rent, equipment and administrative staff; and, thirdly, to remunerate member photographers in line with their contribution to the commissioned work and stock sales.

For some photographers the development of the Internet has helped them to become more independent by reducing their reliance on the intermediate suppliers to distribute their work, and thus allowing them to retain 100 per cent of the licensing fees.

3.7.2 The flow of rights and payments for visual artists

The visual artists supply chain below illustrates the ways in which a visual artist (photographer, illustrator or designer) can distribute its work to end users. There are several similarities with regard to the flow of payments, licences and rights for these three types of visual artists, and so we address them concurrently, highlighting, when relevant, the differences between each.

⁴⁶⁵ In the Global Stock Image Market Global Survey 2012 respondents identified ongoing price deterioration of visual content as the single biggest future concern for the industry. Citation below.

The simplest model is for visual artists to distribute directly to the end user, with no intermediaries. The copyright would remain with the visual artist, and the end user who purchases the work would not have the right to duplicate or edit the work for further communication or distribution. An example of this would be a photographer selling her work to end users on her own website. A less direct route is for visual artists to sell a collection of works wholesale to retail market participants. This could be either to digital retail providers or physical retail providers, the former of which would be primarily through online retailers and the latter through a combination of online and brick-and-mortar retailers.

As well as direct supply to end users or retailers as standalone works, visual artists may also supply their work to exploiters who incorporate the images into wider publications, or editorial or commercial content. The principal exploiters are publishers, press agencies and advertising agencies. Exploiters may choose to purchase pre-produced content from visual artists or may commission visual artists to produce a specific work. In both cases the exploiters would negotiate a contract with the visual artist which specifies the rights being assigned from the author to the exploiter. In principle, the visual artist and the exploiter negotiate a contract which specifies the rights to be transferred to the exploiter, including the duration of this rights transfer, the geographic scope to which it applies, the products for which it can be used and whether, or not, it is exclusive. This contract would also specify the corresponding remuneration arrangement, which we discuss in more detail below.

In the case of commissioned work, the rights would be agreed directly between the visual artist and the exploiter, e.g. a publisher, and possibly with the visual artist relying on the expertise of an agent. However, in the case of pre-produced visual content, in addition to these channels, the rights may also be purchased through a stock agency that contains the visual artist's work. This is why the 'stock agency' is shown in pink in Figure 3.14 the diagram below, as it does not necessarily form part of the supply chain for visual artists. For more high profile visual artists the use of a stock agency may be less prevalent, with these visual artists instead preferring to negotiate directly with the prospective exploiter or through their own individual agent. However, for less well established visual artists, the use of a stock agency may be deemed more necessary in order to allow a wider audience to access their work. Further still, for visual artists who see their works as more of a secondary source of income and/or a hobby, the use of a stock agency may be more commonplace (and, in particular, the use of microstock agencies for the reasons discussed earlier), as these visual artists are perhaps less willing, and/or able, to negotiate directly with the exploiter.

With specific regard to photographers, these visual artists may also benefit from the support of photographic cooperatives. For some photographers, this may be seen as a more viable route to market, for example, given the high overhead costs of production, promotion and sales and administration, as well as the potential benefit of increased exposure. Photographic cooperatives, however, have been omitted from the general visual artists supply chain as they are only applicable to photographers, and even then only to a small proportion of photographers.

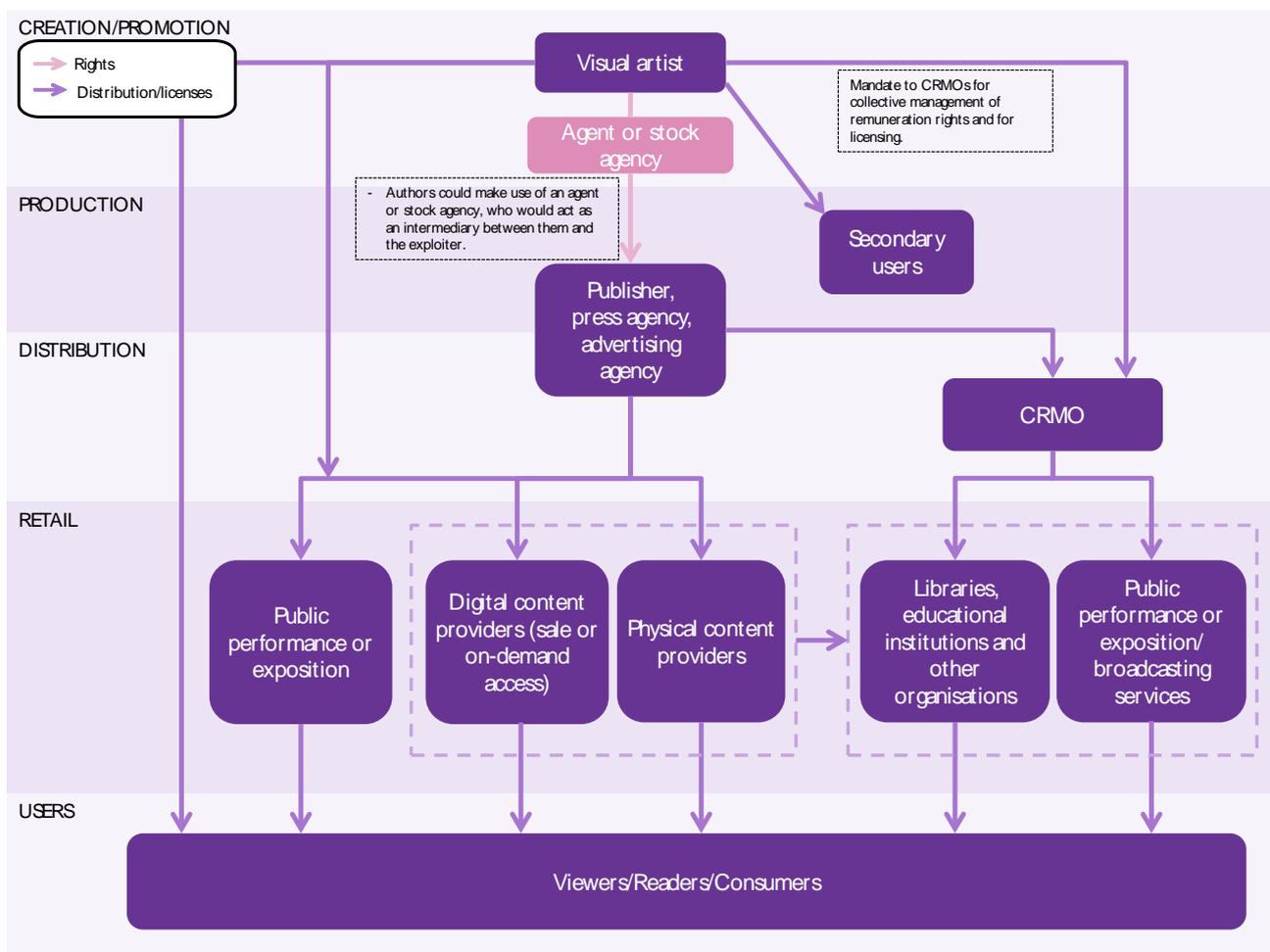
Once a contract has been agreed between exploiter and visual artist, with or without the help of an agent (or photographic cooperative), the exploiter can then, depending on the specific rights assigned, exploit the work for use and distribution in a number of forms. This includes physical content, digital content for one-off sale, and digital on-demand content available on a subscription basis.

Dependent on whether or not the rights were assigned to the exploiter, either the visual artist or the exploiter may negotiate contracts with other individuals and organisations who want to make secondary use of the work (secondary users), such as the use of a photographer's work in a range of merchandising, or the use of an illustrators character in a film or TV series.

Another key aspect of the supply chain is the CRMO who ensures that visual artists receive fees in line with their remuneration rights. CRMOs collect monies in some Member States in various ways which include: a collective licensing scheme for photocopying, a collective licensing for the incorporation of visual artists’ works in slide creation, and another collective licensing scheme covering the cable retransmission which includes the work of visual artists.

Therefore, the two principal groups interacting with the CRMOs are, on the one hand, libraries, educational institutions and other organisations who are likely to be engaged in reprography and slide creation, and, on the other hand, the providers of public communication and broadcasting services, who would require collective licensing schemes for cable retransmission. The remuneration rights provide a source of payment to visual artists for use of their work for which individual contractual arrangements would be impractical.

Figure 3.14: Flow of rights, licences and distribution for visual artists



Source: Europe Economics.

In considering the flow of payments, as with previous categories of authors, it is again useful to distinguish between two key payment channels: primary income channels, such as the flow of payments from a publisher for the exploitation of the visual artist’s work; and additional income channels that are organised by CRMOs through the collection of licence fees and levies for various uses and the payment of fees to visual artists. We consider each in turn.

With regard to primary income channels, the contractual arrangement between the visual artist and the exploiter would specify the remuneration arrangement between them. For non-commissioned work, there are two key types of pricing structure to consider:

- Proportional remuneration.

- One-off payment.

A proportional remuneration structure is where the remuneration paid to the visual artist is based on the use of the work. The usage fee would depend on a number of factors including: whether the use is exclusive or not; the duration of use (i.e. a fixed term or in perpetuity); the geographic scope of use; the placement/context of use (e.g. on the front cover, or inside, a publication); the mediums on which it can be used (e.g. digital or print media, or both); and, in the context of photography, the resolution of the image. A remuneration payment would be arranged based on agreed use, and a new remuneration arrangement would, in principle, need to be agreed for any additional use. Under this structure, visual artists get a type of royalty payment, as it reflects the extent of usage of the work. This pricing structure tends to be associated with higher fees and with visual art content which has a higher value added and more specialised/stylised content.

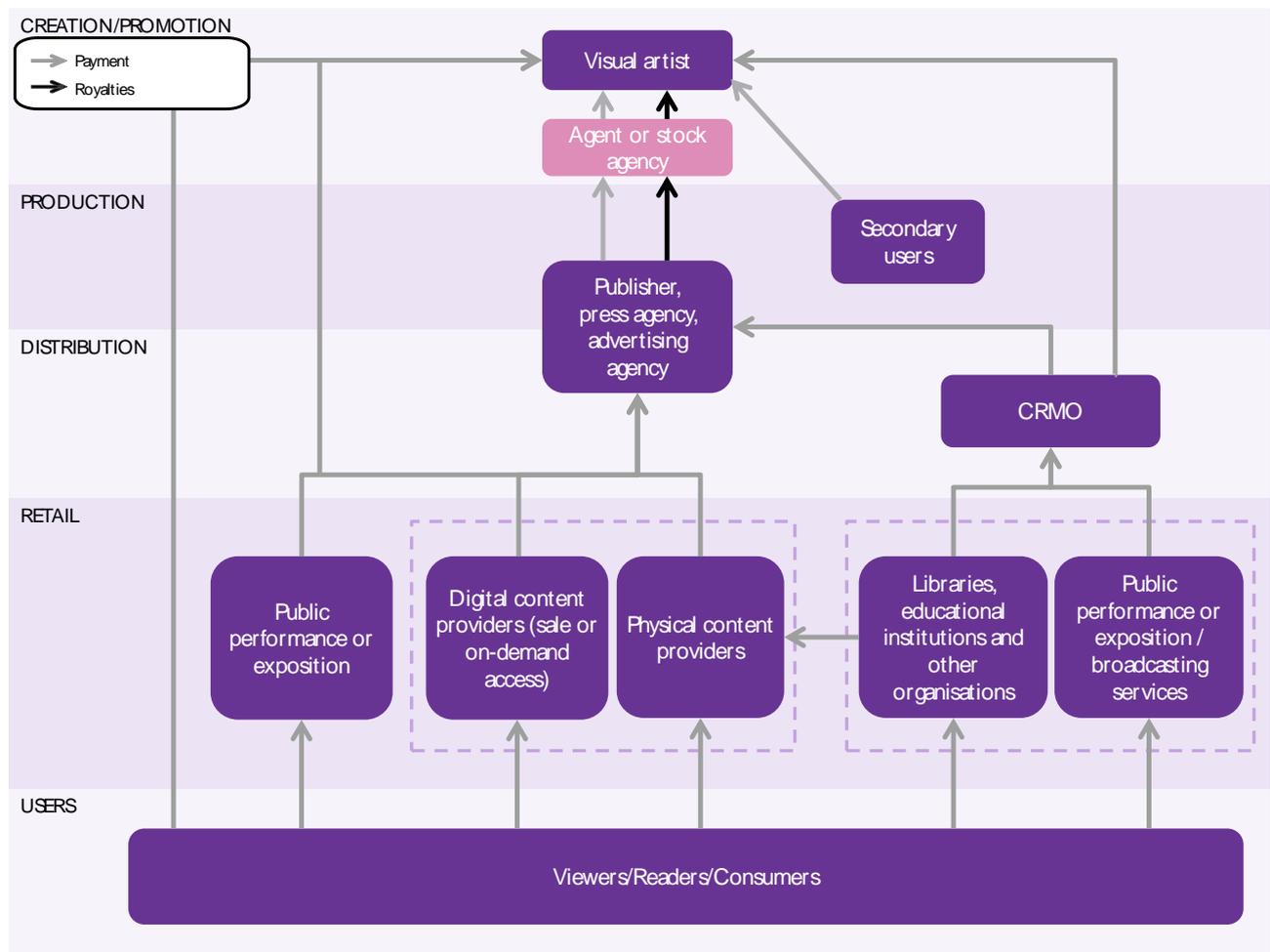
Proportional remuneration is the traditional licensing model in the visual arts industry, although one-off payments are continuing to represent a growing proportion of the non-commissioned stock visual arts market.

Here we have discussed the principal ways in which visual artists receive payments from the exploiters of their work. This flow of payments is likely to be crucial to the overall income of the visual artist. Of course, in the presence of an agency (or photographic cooperative) that acts as an intermediary between the visual artist and the exploiter, the agency will receive some contractually agreed share of the flow of payments from exploiter to visual artist. This contractually agreed share will depend on a number of factors, including whether the licence is royalty-free. If a visual artist has interacted with a secondary user of their work and have concluded an agreement then they will also receive income for the use of their work from them.

The exploiters will themselves receive a flow of payments from the various retail-level participants: the physical content providers and the digital sale, and on-demand, content providers. Retailers themselves would receive payments either in the form of direct sales to end consumers (or libraries, educational institutions etc. as represented by the grey arrow between libraries and retailers), or through subscription payments from end consumers in exchange for on-demand access. Exploiters may also earn income through direct communication to the public, for example, by staging an event to promote the work of a particular visual artist. Of course, if a visual artist's contract with an exploiter is not exclusive, or is yet to be agreed, then a visual artist may receive direct payments from wholesale or retail sales.

Visual artists also authorise CRMOs to collect payments relating to their remuneration rights, and in turn receive fees periodically from this payment pool. These fees derive from the licences paid by various institutions and organisations who make use of the work and for whom it is not practical to license each work on an individual basis as well as from levies. The amount received by the visual artist will depend upon, among other things, the number of licences granted and the number of other visual artists who are registered with the CRMO, the amount collected, etc.

Figure 3.15: Flow of royalties and payments for visual artists



Source: Europe Economics.

4 Analytical Approach

In the previous sections we have identified the legal provisions that have the potential to influence remuneration and the key players with whom authors negotiate their remuneration. However, to analyse the remuneration of authors we must understand the range of economic forces, constraints (including, but not restricted to, legal constraints) and incentives that might be expected to affect remuneration outcomes, and the process by which the contracts are defined. This forms the theoretical framework against which the data gathered through the legal review and survey of authors are examined. The data will then be used to determine the extent to which such factors do in fact influence the remuneration of authors and, in particular, the role of the legal framework in determining the observed outcomes.

In practical terms, this chapter seeks to answer the following questions:

- what are the main factors affecting the remuneration of authors;
- how do these factors affect remuneration; and
- what role does the legal framework have.

4.1 Development of theoretical framework

As noted above, the first step in our analytical approach is to develop a theoretical framework within which it will subsequently be possible to assess the remuneration of authors. The theoretical framework is designed to be general in nature and is intended to encompass all types of author across the relevant industries and from any Member State. Given this objective, it has of course been necessary to simplify reality and, as a result, the framework highlights stylised economic mechanisms that will help our thinking when the complexities of individual countries and the specificities of different types of author are applied to the framework.

The figure below presents an overview of the process by which the level of remuneration received by authors is determined and identifies the key influences on remuneration outcomes.

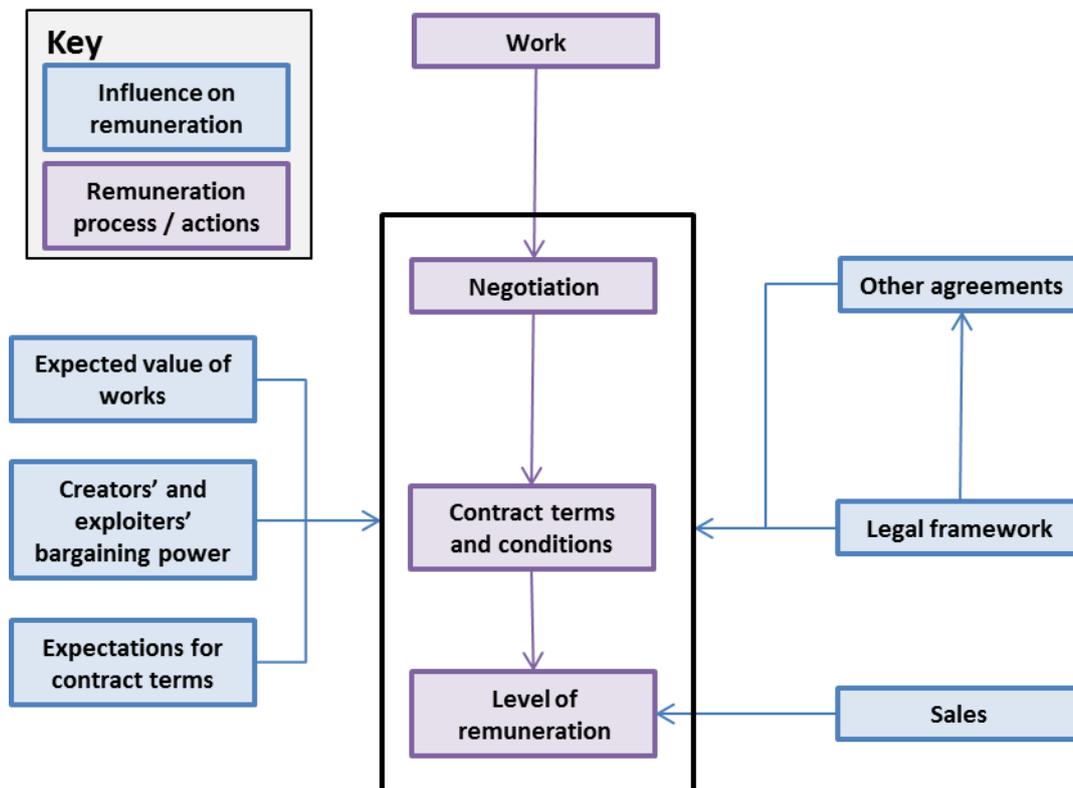
As shown in the figure, the first step in the process is that a piece of work has been developed by an author (e.g. a fiction work) or an author is approached to create a specific work for the exploiter (commissioned work). The creator (i.e. the author) and exploiter will then enter into contract negotiations, which will in turn result in a specific contract with set terms and conditions and set remuneration agreements (the actual level of remuneration will, in some cases, be affected by the commercial success of the work). The figure also presents a number of high-level influences of the negotiation (i.e. factors that can potentially affect the level of remuneration received by the author). Subsequent diagrams in this section describe these influences in greater detail and illustrate how they may affect the remuneration of authors.⁴⁶⁶

It is important to note that this framework has been designed to capture all types of possible contractual arrangements. Therefore, some elements of the figure may seem to be less applicable to certain types of remuneration contracts. For example, it is typically the case that CMOs apply the same terms and conditions to each of its members and hence there is no room for negotiation. Similarly, certain remuneration contracts may be in the form of lump-

⁴⁶⁶ It should be noted that the influence of the legal framework is covered in several different sections below. The legal factors discussed in detail in this chapter are: rules on the form of payment; collective bargaining; exclusive/non-exclusive nature of rights; waivable/non-waivable character of non-exclusive rights; and rules on transfers of rights (e.g. specification of modes of exploitation, limit on transfer of rights of future works, future modes of exploitation).

sum payments and so independent of sales. Such cases can nonetheless be accounted for within the proposed theoretical framework: there would simply be one or more 'missing' boxes from the specific diagram. Similarly there are economic country-specific features (e.g. the size of the relevant domestic market, consumers' preferences and appetite for recreational and cultural activities) that clearly affect remuneration and which we do not discuss explicitly in this sections — even though they have been accounted for in the statistical analysis of Section 5 and Section 6.

Figure 4.1 High-level process of securing remuneration



Source: Europe Economics.

The following sub-sections discuss the framework in more detail. More specifically, sub-sections 4.2-4.4 describe the main economic mechanisms shaping remuneration, whilst sub-section 4-5 describes the way in which remuneration is affected by legal and institutional frameworks. It should be noted that a 'no negotiation' case can be captured by the discussion below in the sense that it is an extreme example in which the bargaining power is held entirely by a single party which is able to dictate the terms of the agreement. In such a case, the options available to the other party are 'take it or leave it'.

4.2 Informational problems and remuneration

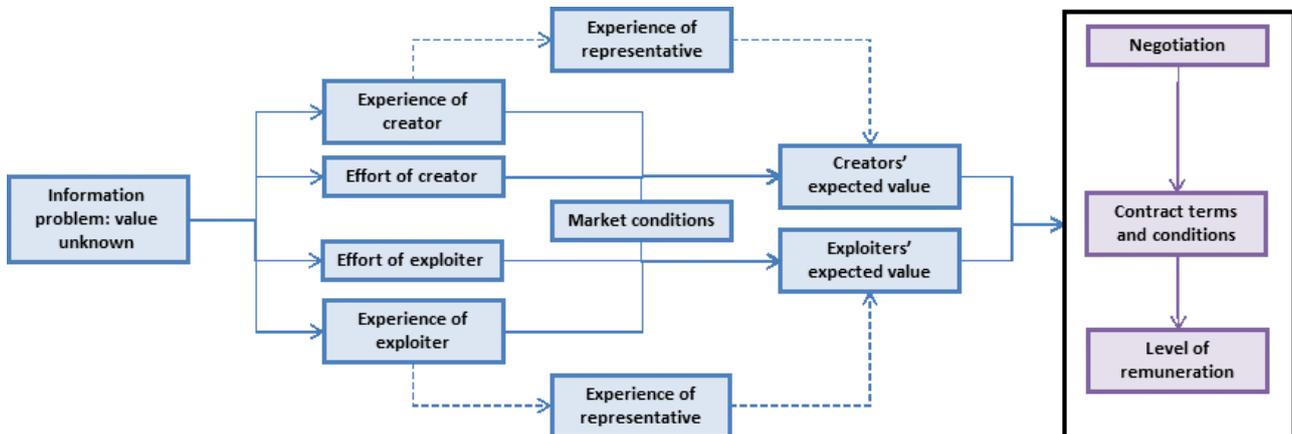
The characteristics of both the product itself and the product market have important implications for the functioning of a remuneration system, particularly with regards to information on the value of the product.

In this study, the product in question is the economic right for the purchaser to exploit the works of an author.⁴⁶⁷ The value of the product to both the seller and the purchaser is dependent on the actions of third parties: end consumers (notwithstanding the fact that the creator and exploiter can themselves influence the outcome through their effort). The value of

⁴⁶⁷ We abstract from the small minority of cases in which a creator may interact directly with an end user.

the economic right cannot be known by either party *ex ante*, as in any transaction involving an intermediary, neither the author nor the purchaser know precisely how many sales of the economic right can be achieved nor the total revenue that would be achieved through the sale of the product until after the economic right has been purchased. Both parties to the transaction face an information problem. The figure illustrates the information problem underlying the negotiation.

Figure 4.2: Influences on expected value



Source: Europe Economics.

In particular, the figure shows that the existence of an information problem means that at least one party to the transaction will have imperfect information on which to base her expectation of the value of the work which, in turn, would affect the level of payment / remuneration that the party seeks during negotiations. Since the market success of the work cannot be known by either party *ex ante*, each party will need to form its expectation based on the information that the party holds on the quality of the work and of the author (information which may be asymmetric) and their judgement of the likely market success of the work. The *ex post* accuracy of the latter estimate may be improved given greater experience and hence both the experience of the creator / exploiter and any representatives that they use can affect expected values.

However, the *ex post* success of the product is also affected by the effort exerted by both the creator and exploiter, and the effort exerted by one party may not be verifiable by the other (which is another information problem). This is particularly relevant for commissioned work and instances where promotional activities play an important role e.g. book tours to publicise the launch of a book. This will be factored into judgements on the expected value of the product and subsequent contracts may be designed to provide positive incentives for effort and thereby to maximise income for both the creator and exploiter.

The interplay of asymmetric information, risk and incentives will affect the nature of contractual agreements. The presence of asymmetric information will affect the negotiation differently depending on the nature of the asymmetry. Specifically, the impact will differ significantly between cases where the information is held by the creator and cases where the information is held by the exploiter.

4.2.1 Imperfect information and asymmetric information problems

In economics the concept of *imperfect information* refers to a situation in which the value of a relevant economic variable is uncertain. In the context of this study, problems of imperfect information arise because the market success of the author's work (i.e. the scale of revenues

that will be generated by the sale of the author content) cannot be known by either party *ex ante*. The end users of the authors' content (e.g. readers, listeners, audience) play a key role because their preference over the author's content and the way in which this is provided are ultimately responsible in determining market success.

The concept of *asymmetric information* refers to a situation in which one party to a transaction has relevant information, whereas the other does not. In this context both the author and the exploiter face information asymmetries. On the one hand, the exploiter has less information than the author on the underlying quality of the author's content; hence, if there is an up-front payment for authorship the exploiter faces a material asymmetric problem because they cannot monitor the effort the author has put in creating its content. This asymmetry will be present until the work is produced; at that point, even if neither the author nor the exploiter knows the extent to which the work will sell and the perception of the public regarding the work, both of them are able to see the quality of the work. On the other hand, the author has less information than the exploiter on the effort and investments (e.g. promotional activities, distribution and marketing investments) the exploiter will make in order to maximise the economic exploitation of the author's content. Equally, the exploiter is likely to have superior information on the current market conditions and market tastes due to privately held information regarding sales of their publications and any monitoring they do of the success of their competitors.

It is clear that both uncertainty over the market value of the author's content (i.e. imperfect information) and lack of information of one party over the possible behaviour of the counterparty (i.e. asymmetric information) will affect the perceived expected value of the authors' content and, ultimately, the level of remuneration.

There is an extensive body of economic literature that has analysed how remuneration mechanisms could be designed in order to account for or alleviate information problems and therefore, in the next two sub-sections, the structures of remuneration agreements are analysed within this economic framework.

4.2.2 Remuneration mechanisms to account for imperfect information

The uncertainty over the value of the authors' content and its ultimate market success expose authors and exploiters to an intrinsic level of risk. The type of remuneration mechanism agreed between the author and the economic right exploiter can determine the extent to which this risk is shared between the two parties. In a stylised way, the remuneration mechanism can be thought of being made up of three separate components:

- *Upfront (ex-ante) payment* — in this situation the author receives a lump sum payment before the completion of her work.
- *Lump-sum (ex-post) payments* — in this situation the author receives a single payment upon completion of her work (often conditional on the work meeting some quality standards) and before the market success of the authors' content can be observed. This type of agreements is the norm in the context of commissioned assignments.
- *Proportional (conditional) remuneration payments (royalties)* — in this situation the money received by the author depends on the actual level of sales or revenue achieved (e.g. the author receives an agreed determined percentage of the sales revenues).

If the remuneration agreement relies entirely on upfront or lump-sum payments (or any combination of the two), the downside risk (i.e. the risk that the work is not successful) is wholly borne the exploiter; if the work is unsuccessful the exploiter may make a loss, equally all returns earned above and beyond the amount of the lump sum will be retained by the

exploiter. In contrast the author's remuneration will not be affected by the market success of her work.

If the remuneration agreement is based entirely on a proportional remuneration scheme, then the risk is shared between the two parties because the income they receive is entirely dependent on the market success.

In reality, it is common to observe hybrid remuneration schemes that include an upfront, a lump-sum, and a proportional remuneration component. In these situations a portion of the author's remuneration is certain and independent from market success, whilst the remaining income is dependent on the revenues generated by the sale of her work. Therefore, the higher the proportion of the authors' total income generated from lump-sum payment, the greater is the transfer of risk away from the author and towards the exploiter.

There are a number of economic rationales to explain why lump-sum and/or upfront payments might be often used in practice:

- *Exploiters are better placed in managing risk than authors:* exploiters can diversify risk across a wide portfolio of authors' works. For example, the potential loss an exploiter faces in relation to the work of one author will be, on average, offset by the profits generated by the works of other authors. Even though some form of risk diversification is possible also for individual authors (e.g. because the poor commercial performance of one of the author's work could be offset by the success of other works she created), the size of the portfolio of works for any individual given author is typically much smaller than that the one available to exploiters, hence the ability to diversify risk is much more limited.
- *Authors have different time preferences than exploiters:* lump-sum payments result in remuneration for the creator today whereas proportional arrangements result in payments being received over time. The theory of time preference for money states that individuals prefer to receive money today over an equivalent payment in the future. Individuals will differ in their strength of preference for payments today: those with a strong preference for payments today are referred to as having a high discount rate, while those that have less strong preferences for immediate payment have lower discount rates. Authors can be thought of having higher discount rates than exploiters (e.g. because they are likely to be subject, on average, to a stricter cash constraint than exploiters, hence they may have a stronger preference for lump-sum payments).⁴⁶⁸ That said, in situations where the author has a high confidence on the commercial success of her work (an example might be a book author who has written a number of best-sellers) we would expect that the authors' preference would be for a proportional remuneration which exposes him to a greater risk, but also to, potentially, a greater financial reward.

4.2.3 Remuneration mechanisms to alleviate asymmetric information

The commercial success of a work is also affected by the actions taken by the author and the exploiter. On the one hand, the chance of market success is likely to be higher the greater is the effort exerted by the author to ensure the content produced is of the highest quality. On the other hand, the commercial success depends also on the exploiter's commitment to invest enough marketing resources to promote, and distribute the author's work. Whilst both parties have an interest in the counterparty party taking all necessary actions to increase the quality of the creative content and that chance of market success, neither of them is able to monitor and ensure that these actions are actually taken. Different remuneration mechanisms provide different incentives to alleviate these problems.

⁴⁶⁸ Timing issues are also discussed below in the context of bargaining power in negotiations between authors.

- *Upfront (ex-ante payment)* — under this form of remuneration, authors receive a payment before the completion of the work and therefore they have little or no incentives to exert effort to guarantee that the content created is of the highest possible quality.⁴⁶⁹
- *Lump sum (ex-post) payments* — under this arrangement, the author is paid after the completion of the work and therefore she has incentive to put enough effort to guarantee a minimum quality standard (since meeting such standard is typically required in order to receive the payment). However, under this type of remuneration the author has little incentive to engage in actions that might increase the sales of her product because her remuneration is independent of sales.⁴⁷⁰ In contrast this form of remuneration provides the exploiter with strong incentives to promote the product and achieve maximum sales because this is the only way by which she can recover the lump-sum payment costs already incurred.
- *Proportional (conditional) remuneration payments (royalties)* — this form of payment provides incentive for both the author and the exploiter to exert effort in order to increase sales. The extent of incentives provided under proportional remuneration depends also on the proportions (e.g. percentage of sales revenues) received by the author and the exploiter. For example, an arrangement in which the exploiter receives 95 per cent of the realised value of the work would provide a strong incentive for the exploiter to promote the work but a rather weak incentive for the author. Conversely, incentives for the creator would be higher the greater is the percentage of revenues the author is entitled to receive.

4.2.4 Impact of remuneration models

The analysis provided in 4.2.2 and 4.2.3 sets out an economic framework which helps understand the impact that three stylised models of remuneration (i.e. upfront remuneration, lump-sum remuneration and proportional remuneration) have on the degree of risk sharing between authors and exploiters, and their incentive to exert effort in order to increase the quality of creative contents and their chance of achieving commercial success. The main result of this analysis is that there exists no single remuneration scheme which is capable of shielding both the author and the exploiter from commercial risks, whilst ensuring that both parties exert the highest possible effort in order to increase the market sales (see Table 4.1 below).

Table 4.1: Remuneration mechanisms, risk-sharing, and incentives

| | Upfront (ex-ante) payment | | Lump-sum (ex-post) payment | | Proportional (conditional) payment | |
|---------------|----------------------------------|---------------------------|---|---|---|--|
| | Risk | Incentive to exert effort | Risk | Incentive to exert effort | Risk | Incentive to exert effort |
| Author | Subject to no risk. | No incentive. | Subject to moderate risk of not meeting quality | Incentive to meet quality standard present. | Subject to market risk. | Incentive to meet quality standard and to increase |

⁴⁶⁹ Obviously, the potential for an author to be hired by the publisher/broadcaster again in the future will also affect the incentive to exert effort. Therefore, reputation also plays an important role in explaining authors' incentives. However, in this section we consider risk sharing and effort and remuneration in isolation – other factors such as, e.g. reputation, are discussed later.

⁴⁷⁰ To note the existence of a best-seller clause, where the author receives an additional payment if a certain level of success is achieved, would create incentives for the author to maximise the actual sales achieved. It would only affect the balance of the risk borne by the author and exploiter if the initial lump sum payment is lower than it would have been in the absence of the bestseller clause.

| | Upfront (ex-ante) payment | | Lump-sum (ex-post) payment | | Proportional (conditional) payment | |
|------------------|--|---|--|---|---|--|
| | | | standard. | | | chance of market success present. |
| Exploiter | Subject to high risk of receiving low quality work and to market risk. | Incentive to increase chance of market success present. | Subject to moderate risk of receiving low quality work and to market risk. | Incentive to increase chance of market success present. | Subject to market risk. | Incentive to increase chance of market success present |

Based on the stylised conclusion summarised in Table 4.1, hybrid forms of remuneration that include an upfront, a lump-sum and a proportional component can be rationalised from an economic viewpoint as attempting to strike a balance between the need to reduce authors’ exposure to risk whilst ensuring that the appropriate incentives are in place.

Also, it is important to notice that the specific remuneration agreements used are, to a large extent, dependent on the typology of creative work involved. For example, writing a book is a time consuming and lengthy process and therefore upfront payment may represent the appropriate way for exploiters to compensate book authors for their ongoing work. Similarly, publishing a book is a potentially expensive undertaking and one individual book’s failure or success is likely to have a more significant impact on a publisher’s business compared to failure or success of, e.g., a single photograph published on a daily newspaper. For these reasons it would be natural to expect proportional remuneration agreements to be more common in the context of book-publishing than in contexts where authors work on a commissioned basis to create several works in a relatively short timeframe.

Finally it is important to stress that the conceptual framework described here is unlikely to be applicable for one specific category of author, namely authors of scientific publications. Remuneration and publishing payment flows need to create the right incentives to produce content in the first place and then publish it at a price that rewards production of the content as well as distribution. However, the primary objective of a scholar is to establish themselves in the scientific community and to have many people read their ideas. In most academic fields this goal is achieved by having manuscripts accepted for publications in authoritative peer reviewed journals, irrespectively of whether or not a payment is received.

In what follows we discuss economic factors, other than the specific way in which remuneration mechanisms are designed, that can have an important impact on remuneration levels. These factors (discussed in the remainder of this section) are:

- Experience.
- Reputation.
- Intermediaries.
- Bargaining.

4.2.5 Experience

Experience (of the creator as well as of the exploiter) can play an important role in determining authors' remuneration levels because of the role it plays in alleviating imperfect information problems. More specifically:

- A high level of experience on the author's side can be perceived as a signal of the underlying quality of the work and increase the exploiter's confidence that the work is of high value.
- Similarly, an exploiter with high experience might be very good at assessing the potential commercial success of an author's work.

However, it is important to stress that a significant discrepancy between the experience level of the author and that of the exploiter can also increase asymmetric information problems. For example, an experienced exploiter who is very good at scouting new talents, is unlikely to reveal her true commercial evaluation of the author's work in order to secure advantageous contractual terms (e.g. by offering the author a contract with a tempting lump-sum payment but which entitles the author to a very small proportion of sale revenues).

4.2.6 Reputation

When contractual interactions between an author and an exploiter are frequent and repeated over time, this creates greater incentives for both parties to exert high effort levels. This is the case because failure to do so would have a detrimental impact on professional reputation and may lead to the sudden termination of a mutually beneficial business collaboration.

Reputational concerns may also have other important implications: for instance, authors may share negative feedback on their previous exploiters with their colleagues. The extent to which this issue might result in a significant detriment for the exploiter's reputation also depends on the structure of the market. For instance, analysing the market of authors of books, the reputational concern might represent a minor issue, since the number of publishers is very limited and hence authors would not have a significant number of options from which to choose a publisher. On the other hand, if self-publishing achieves a greater role in the market then it could represent an outside option that may have increased reputational impacts, as far as publishers' reputation is concerned.

In general, therefore, in the presence of frequent and repeated contractual interactions the use of remuneration mechanisms designed to provide sufficient incentives is potentially less important compared to the case in which contractual interactions are sporadic.

4.2.7 Maths Example 1: A stylised formal model of remuneration

To illustrate some of the issues of the previous few sections, we can set up a stylised mathematical model of how remuneration is determined, which we shall use in later sections to gain key insights about contractual issues such as best-seller clauses and collective agreements.

There is one publisher, and there are k authors. Of the k authors one is of significantly higher quality than the other and is capable of producing a best-seller. We assume that the total profits generated from a best-selling author's work is Π_H , whilst the profit generated by the work of any other author is Π_L . The publisher engages with authors by offering a royalty rate (i.e. a percentage of the profits generated by the author's work) denoted by q . The ex ante probability of any author being the high quality one is $1/k$.

We assume that there are two stages of interaction between the author and the publisher. In stage one the publisher makes an offer, q_1 , (where q_1 is the royalty rate for the author's work). The author then decides whether or not to accept the offer and, if she does so, she exerts effort, e , to produce the work. Once the work has been produced it generates a profit (either Π_H or Π_L) and the underlying author's quality is revealed to both the author (who does not know ex-ante whether or not she is of best-seller quality) and the publisher (who also does not know the authors' quality prior to observing the profits generated by her work).

In stage two we assume that only a best-selling author has a second agreement with the publisher for which she receives a royalty rate equal to q_2 . We discuss below how q_2 is determined and scenarios for when a second book is or is not produced. If a second book is produced, then the author exerts effort e to produce the second book and the profits generated from the second work are again Π_H .

We analyse the interaction between authors and publishers under two different scenarios. The first scenario is one without a best-seller clause and is modelled by imposing that the royalty rate in stage one and stage two are the same ($q_1 = q_2$). In the second scenario there is a best-seller clause which is modelled by giving the high-quality author the option of choosing a more favourable royalty rate for the second work she produces — specifically we assume that the best-seller author can make a take-it-or-leave-it offer to the publisher and it is up to the publisher whether or not to accept it.

Irrespective of the quality, any author has a fixed outside option equal to v .

In our base case a best-selling author receives the same royalty rate for both works produced and therefore the author's ex-ante expected profit in Stage 1 is:

$$EU = \frac{1}{k}(2q\Pi_H - 2e) + \frac{k-1}{k}(q\Pi_L - e)$$

An author will accept the offer made by the publisher in Stage 1 only if her expected utility is greater than her outside option v . Formally, this means that the royalty offered by the publisher must satisfy the following participation constraint:

$$\frac{1}{k}(2q\Pi_H - 2e) + \frac{k-1}{k}(q\Pi_L - e) > v$$

which, after some rearrangement means the minimum required royalty rate to secure participation is:

$$q > \frac{k(v + e) + e}{2\Pi_H + (k-1)\Pi_L} \quad [eq. 1]$$

4.3 Intermediaries

Sometimes authors and exploiters do not deal directly with each other, but do so through intermediaries. Intermediaries can be distinguished into two broad categories:

- Intermediary agents who operate exclusively on behalf of either the author or the exploiter. In our context, examples of these types of intermediaries are legal representatives (who can represent the exploiter's interest or the author's interest), and publishing agents (who work for book authors).
- Independent intermediaries who do not act on behalf of either party, but rather facilitate the exchange of rights between authors and exploiters. An example of this type of intermediary is represented by platforms and photographic stock agencies such as Getty Images.

The role that intermediaries play in economic transactions has been analysed by an extensive body of economic literature.⁴⁷¹ The economic theory of intermediation identifies (among others) the following key contributions of intermediaries:

- Providing economies of scale — when parties trade directly they engage in a variety of costly and time consuming activities (e.g. bargaining, negotiating and drafting contracts). Where intermediaries handle a high volume of negotiations (e.g. with multiple authors and exploiters), they can potentially achieve significant economies of scale.
- Creating network effects — in economics the concept of network effects refers to the idea that the value of a product or service is dependent on the number of individuals using it. Network effects are present when intermediaries succeed in bringing together many potential buyers and sellers. An example of such intermediary is Getty Images where the network effects arise because photographers benefit from the presence of many potential exploiters using the platform and, similarly, exploiters benefit from the fact that many photographers use the platform.
- Decreasing search and matching costs — Intermediaries enhance market performance by coordinating market transactions. They act as a matching mechanism: they match exploiters with specific needs to authors that offer works with specific characteristics and, by doing so, they increase the overall volume of negotiations.
- Alleviating asymmetric information — by virtue of the large number of negotiations in which they are involved, intermediaries might be able to make more accurate assessments of the value of the author's work than any given single author or exploiter.

The specific economic contribution that intermediaries deliver depends on the nature of the intermediary in question. For example, economies of scale, network effects and decreases in matching costs are likely to be important features of all intermediaries that facilitate the exchange of rights between authors and exploiters. Alleviating asymmetrical information (e.g. by assessing the potential value of a creative work) is an essential feature of any intermediary agent who, based on this information, will then negotiate a contract accordingly. Intermediary agents can also leverage on economies of scale because, due to their experience, they are likely to be able to bargain, negotiate, and draft contracts, more effectively than either of the interested parties.

Whilst we would expect the use of an intermediary agent who works on behalf of the author to have a positive impact on the author's remuneration, the impact of independent intermediaries on authors' remuneration is unclear. Whilst independent intermediaries can help authors in achieving higher business volumes by exposing their works to a large number of potential exploiters, their role in increasing the remuneration level for any given price of work is likely to be limited.

4.4 Bargaining power and expectations for contract terms

4.4.1 Bargaining power

Irrespective of the form of remuneration adopted, there may be significant scope for bargaining (notwithstanding the fact that certain revenue streams – such as those from CRMOS – are to all intents and purposes non-negotiable).

Previous studies have noted that some authors have relatively little bargaining power in such transactions and it is partly for this reason that collective bargaining agreements have emerged in some countries.⁴⁷² To understand the reasons why authors may have relatively

⁴⁷¹ See e.g. Spulber, D.F., "Market Microstructure" (1999), Cambridge University press.

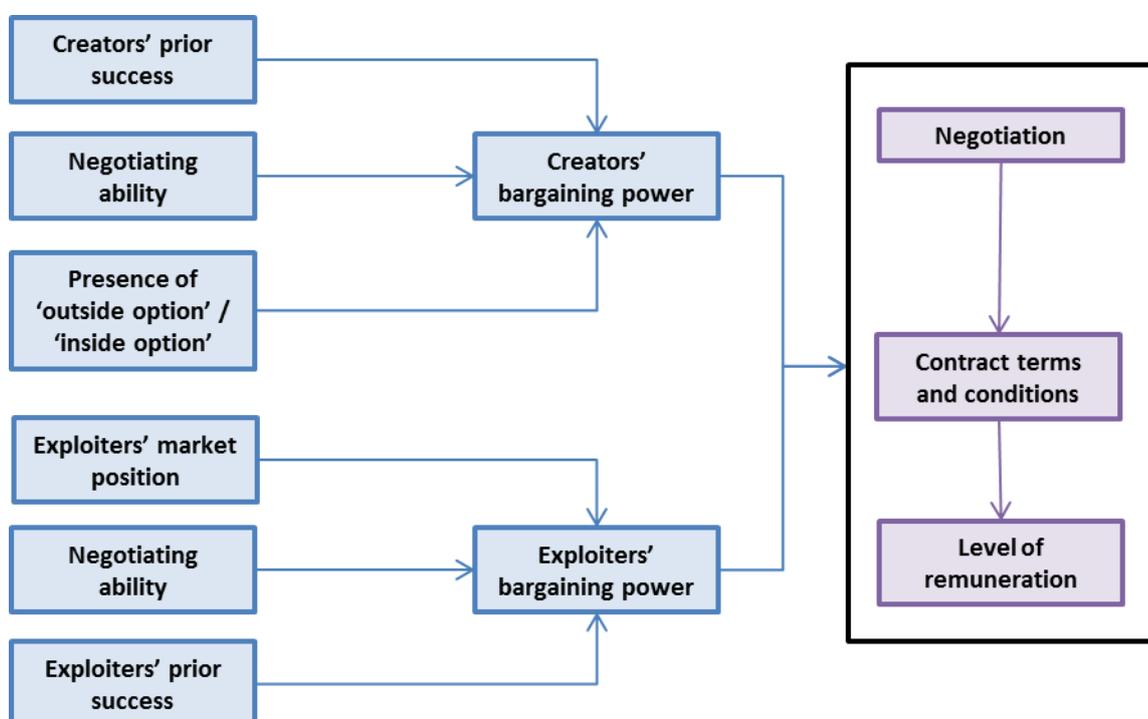
⁴⁷² See, for example, Institute for Information Law, Amsterdam (2002), "Study on the conditions applicable to contracts relating to intellectual property in the European Union", p32.

little bargaining power it is necessary to understand the full range of factors that influence bargaining power, and thereby affect the outcome of a negotiation. The key influences on the bargaining power of the creator and exploiter are shown on the figure below.

The creator's bargaining power is influenced primarily by:

- Prior success (the more successful a creator has been in the past, the greater her bargaining power today, based on an assumption that their works will be more valuable).
- Negotiating ability (the more adept the creator is in influencing the views of others, the greater his/her bargaining power).
- Presence of an outside option (creators will have greater bargaining power if they have several interested exploiters than if they only have one option).
- Presence of an inside option (creators will have greater bargaining power if they have an option to earn income on their work while negotiations with the exploiter are at an impasse).

Figure 4.3: Influences on bargaining power



Source: Europe Economics.

Note: The bargaining power of the exploiter is likely to be more important in certain settings than in others. For example, there are cases in which the creator will have several parties that are interested in exploiting her work (e.g. if a particular author is in high demand or if a successful author is coming to the end of her current publishing contract).

Both prior success and negotiating ability also influence the exploiter's bargaining power, as does its position in the market. We would expect that a firm with a larger market share would have greater market power which would improve its bargaining position. Indeed, a study by Gale found a positive and significant relationship between the market share of a firm and its profitability, even after controlling for industry concentration, suggesting that the increased market share increases bargaining power and hence a firm's ability to maximise profits.⁴⁷³

With regard to market concentration, then if there are only a small number of large players this would be more conducive to collusive arrangements which again would strengthen the

⁴⁷³ B. Gale (1972), "Market Share and Rate of Return", *The Review of Economics and Statistics*, vol. 54(4), pp. 412-423.

exploiter's bargaining power. An appropriate indicator to capture this effect would be the percentage market share of, say, the three or four largest market participants.

The economic literature has found that the bargaining power of a player is improved if she is more patient than the other player. The concept of patience encompasses aspects additional to the time discount factor such as the haggling cost of the players. For the creator (i.e. the agent in the above models), other sources of income could help to decrease her haggling costs (as this would reduce the immediacy of any financial need) while for the potential exploiter of the copyright, (i.e. the principal in the above models) having other authors in the portfolio could help. However, the cost of a lengthy negotiation may be greater for the creator if there is a particular time / date at which she needs to launch the work (e.g. if the creator needs to release a work by the end of the year, the failure to meet this deadline could result in a loss to the creator and hence the negotiation cost would be higher than in the absence of such a timing constraint).

The presence of outside options for either party will increase bargaining power if and only if the option is considered attractive enough. Moreover, for the outside option to act as a threat, it needs to be a credible one. In addition to outside options, each party may have an inside option, which is the income generated by the product in question while negotiations are at an impasse. The potential for self-publishing of books, which has seen an increase both amongst new authors and established authors in recent years, can be seen as increasing book's author outside options. To a certain extent such outside options may be available also to journalists who can establish themselves as opinion leaders through blogs, whilst this is likely that the availability of such options is more limited for other categories of authors such as translators. The presence of outside opportunities is explored in a paper by Tirole et al (1987).⁴⁷⁴ Outside opportunities are considered as either the decision to bargain with different buyers of one's product or the seller consuming the product themselves. This can be particularly relevant for the creative industries where multiple buyers could represent the different interested publishers and own consumption of the good could involve online exploitation of the produced work without any intermediaries. An example of the latter would be an author's decision to self-publish rather than to use an established publisher, or a photographer's decision to sell work directly on her website rather than to a publisher or relevant agency. The use of such an outside option at one point in time may lead to the author securing a more lucrative contract in the future as it will allow him/her to demonstrate the popularity of her work.

The model is built on the assumption that the seller (i.e. the creator / the agent) will grow pessimistic of the buyer's valuation of their good and will not bargain indefinitely with just one buyer (i.e. the exploiter / the principal). According to the paper, "the link between the buyer's willingness to accept an offer and the seller's eagerness to go outside generate multiple equilibria".⁴⁷⁵

If switching between buyers incurs no costs and there is a large number of buyers then the seller can adopt a 'take it or leave it' approach which makes them as well off as if they could pre-commit to a bargaining strategy. The seller is, in other words, at least as well off as when there is a single buyer. In case of delay costs involved in changing buyers, then the seller could make multiple offers to the current buyer before considering switching. The 'take it or leave it' approach is likely to be available only to a small number of authors: those that have been particularly successful in the past and so are in particularly high demand today. For example, a highly respected famous author may be able to use a 'take it or leave it' approach where they have several exploiters seeking their services but a less famous author is unlikely to be in such a strong bargaining position.

⁴⁷⁴ Fudenberg, D., Levine, D. and Tirole, J. (1987), "Incomplete information bargaining with outside opportunities", *The Quarterly Journal of Economics*, Vol 102, No 1, (February) p37-50.

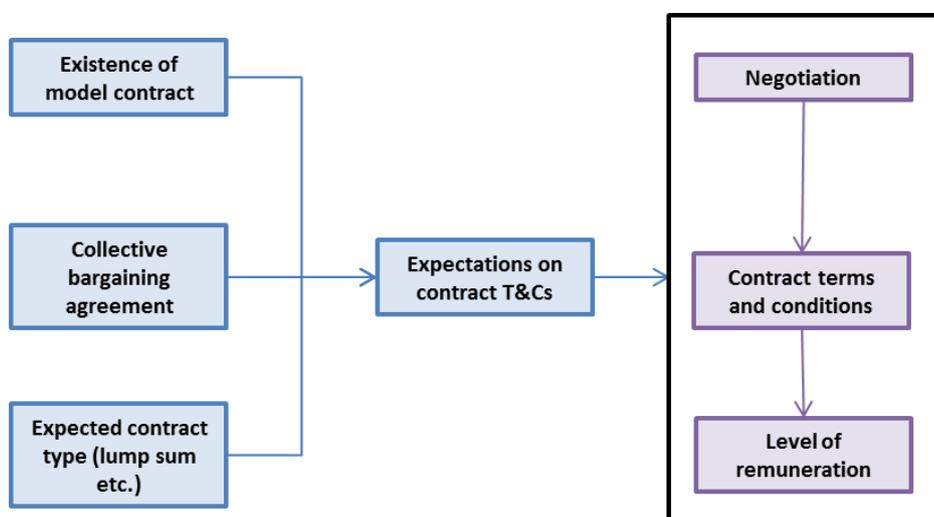
⁴⁷⁵ Fudenberg, D., Levine, D. and Tirole, J. (1987), "Incomplete information bargaining with outside opportunities", *The Quarterly Journal of Economics*, Vol 102, No 1, (February) p37.

4.4.2 Expectations for contract terms

The outcome of a negotiation will, in some cases, be influenced by formal or informal 'industry standards'. For example, 'model contracts' (e.g. prepared by a trade union) may specify expected terms and conditions of a contract, including with respect to minimum remuneration levels or the structure of remuneration payments. Where these apply, there will be a direct impact on the outcome of the negotiation. Even where model contracts do not exist, there may be a 'default' perceived by both creators and exploiters and grounded in knowledge of contracts that were agreed in similar cases and this can lead to a self-fulfilling expectation of contract terms and conditions, and potentially to a de facto model contract.

Collective bargaining agreements, which are typically negotiated by unions on behalf of their members, can also affect the outcome of a negotiation. Such agreements may lead to greater remuneration for the author as they help to overcome some of the difficulties faced by creators with respect to their potential lack of experience and limited bargaining power.

Figure 4.4: Influences on expectations for contract terms



Collective bargaining agreements can cover a range of terms and conditions that affect the working conditions of those covered by the agreement. Some agreements concern only the labour conditions of workers and do not refer to remuneration. Even where remuneration is part of a collective bargaining agreement, a variety of outcomes are possible.

In general, we would expect model contracts and collective bargaining agreements to lead (on average) to higher remuneration for authors. This is because of the fact that collective bargaining helps to overcome the possibility that individuals have relatively little bargaining power in negotiations and may also help to overcome the information problem: the representatives of authors are likely to be better informed about the value of their work than are individuals. Moreover, there is evidence from other industries of the positive impact that collective bargaining has on remuneration. For example, statistics published by the Department of Business, Innovation and Skills in the UK found that the difference in average gross hourly earnings of union members compared with non-members was 19.8 per cent for public sector employers and 7.0 per cent for private sector employees.

It is important to note, however, that while the average level of remuneration may increase where a collective agreement is in place, it may result in worse outcomes for some. Specifically, economic theory suggests that (all else equal) demand falls as price increases, implying that the establishment of minimum remuneration terms may lead to a reduction in demand for authors by exploiters, specifically those authors whom the exploiters do not value sufficiently to be willing to offer a contract under the collective agreement. This may mean that

some individuals would not secure a contract under collective agreements whereas they may have done so in the absence of such agreements (albeit on worse terms and for lower remuneration). For some, therefore, collective bargaining agreements may lead to worse outcomes by effectively excluding them from the market.

Furthermore, the extent to which collective bargaining agreements would affect remuneration depends in part on whether such contracts or agreements are legally binding. Collective agreements will have a stronger influence on remuneration outcomes where they are legally binding: in principle, such agreements could be ignored by exploiters where they are not binding. In contrast, where agreements are legally binding, exploiters are unlikely to renege because of the risk that they would be subject to legal challenge, with potentially damaging long-term effects for the business as well as the short-term financial punishment.

Non-binding agreements lack a credible threat against those that would wish not to comply with the agreements and hence the chance that individual authors' remuneration would be covered by collective agreements is lower where they are non-binding. Moreover, where agreements are non-binding, it is likely that those authors that would receive the minimum level of remuneration would be those that would earn at least as much in the absence of the collective agreement. If the exploiter considers that the value of the creator's work is below the collectively agreed minimum remuneration, they would simply choose not to use the collective agreement and remunerate the creator for less than the non-binding minimum. This could again result in lower remuneration for some creators.

Notwithstanding the above, it is possible that some exploiters would voluntarily choose to apply the non-binding minimum level of remuneration (e.g. because it will help their public relations or corporate social responsibility). There is evidence of this practice in other fields, such as the willingness of some employers to pay the 'London Living Wage' which lies above the national minimum wage for the UK. It is possible that a similar effect could arise under non-binding agreements in these sectors.

Overall, collective bargaining agreements may or may not include issues associated with remuneration. Where remuneration is a subject of the collective bargain, it may specify a minimum level of remuneration or may leave the level of remuneration to free negotiation. The former is more likely to have a positive impact on the remuneration of authors than is the latter while binding agreements are more likely to have a positive impact on remuneration than would non-binding agreements.

4.4.3 Maths Example 2: Impact of expecting producing a best-seller entails a rise in the royalty rate

In Maths Example 1 we solved for the minimum royalty rate required to secure participation by potentially best-selling authors, given that an author's ex-ante expected profit in Stage 1 is:

$$EU = \frac{1}{k}(2q\Pi_H - 2e) + \frac{k-1}{k}(q\Pi_L - e)$$

showing that the minimum required royalty rate was

$$q > \frac{k(v + e) + e}{2\Pi_H + (k - 1)\Pi_L} \quad [eq. 1]$$

Next we consider how minimum royalty rates might be affected by the expectation that producing a "best-seller" would mean a higher royalty rate for later works (e.g. if there were a "best seller clause" in the contract or in the relevant contract law).

Presence of a Best-seller clause

With a best-seller clause a best-selling author has the option to re-negotiate a more favourable royalty rate in Stage 2, once she knows that she is of high quality. Using backward induction we notice that, in the second stage, the interaction between the best-selling author and the publisher is an ultimatum game where the author will ask for a royalty rate $q_2 = 1$. Based on this, the expected pay-off of an author in Stage 1 is:

$$\frac{1}{k}(q\Pi_H + \Pi_H - 2e) + \frac{k-1}{k}(q\Pi_L - e) > v$$

The participation constraint becomes:

$$\frac{1}{k}(q\Pi_H + \pi_H - 2e) + \frac{k-1}{k}(q\Pi_L - e) > v$$

which can be rearranged as:

$$q(\Pi_H + (k-1)\Pi_L) + \Pi_H > k(v+e) + e$$

$$q(2\Pi_H + (k-1)\Pi_L) + \Pi_H(1-q) > k(v+e) + e$$

$$q > \frac{k(v+e) + e - \Pi_H(1-q)}{(2\Pi_H + (k-1)\Pi_L)} \quad [\text{eq. 2}]$$

By comparing equation eq.1 and equation eq.2 we notice that the main impact of the best-seller clause is to reduce the royalty rates authors receive in stage one.⁴⁷⁶ Intuitively this is the case because, with the prospect of becoming best-selling authors and earning higher profits later-on (i.e. in Stage 2), authors are willing to accept lower royalty rates at the beginning of their careers (i.e. in Stage 1). The overarching message is that, whilst best-seller clauses may benefit very successful authors, they do so at the expense of less successful ones.

4.5 The legal framework

In previous sections we have explored the effects of rules on the form of payment and collective agreements on levels of remuneration but have not explored the extent to which other elements of the legal framework might also play a role. The legal analysis presented in Chapter 2 identified that the following features of the legal framework are likely to have the greatest impact on the remuneration of authors:

- The existence of statutory provisions, mainly in copyright law, that protect authors as weaker parties to a contract, i.e.:
 - Obligation to comply with formalities, including the specification of rights assigned and the corresponding remuneration paid.
 - Limits on the scope of transfer with respect to future modes of exploitation.
 - Limits on the scope of transfer with respect to future works.
- The use of model contracts developed as a result of negotiations between representatives of authors and publishers or in the form of collective bargaining agreements made applicable to non-employed but economically dependent freelancers.

4.5.1 The existence of statutory provisions, mainly in copyright law, that protect authors as weaker parties to a contract

Limiting the scope of transfer with respect to future modes of exploitation and future works ensures that the author retains control over the way in which their creation is exploited as new

⁴⁷⁶ Specifically, by:

$$\frac{\Pi_H(1-q)}{(2\Pi_H + (k-1)\Pi_L)}$$

technologies and business models develop. This could be beneficial to an author, by allowing them to renegotiate when a new mode of exploitation becomes available or when they produce new material, and at a point when they are potentially in a stronger bargaining position (because the demand for their works is clearer than it was prior to the negotiation of the original contract). However, having to renegotiate more frequently could delay new exploitation (and therefore the realisation of additional earnings)⁴⁷⁷ and could create potentially significant administrative burden for exploiters (when considering the cumulative effect in particular). The scale of such impacts would determine the extent to which the benefits of such limits are offset by the potential for lower levels of exploitation (caused by the additional costs to exploiters).

In other words, in cases where the author transfers the right for all modes of exploitation known and un-known to the exploiter *ex ante*, if the exploiter does not think that they will make money from pursuing new modes of exploitation they simply will not invest in doing so. Therefore an author who does not transfer the right to exploit her works under any future mode of exploitation may not be able to negotiate a new contract, but will not be worse off than if she had transferred her rights. In contrast, a successful creator will be better off, if she is able to renegotiate.

To see this more clearly, consider the example of limits on transfer of rights of future works. Such limits should ensure that the author has the opportunity to establish a new contract for future works and so would prevent them from being tied into a low-value contract even if their former works were unexpectedly successful. This should ensure that the author can benefit from their prior success as it will affect the relative bargaining power of the creator in the case of future works: the creator will be in a stronger negotiating position if she can demonstrate prior success than if transfers of future works were agreed prior to the market testing of the first work.

In addition, the rules on the transfer of rights limit the extent to which exploiters can benefit from their possession of information that is hidden to the creator, particularly with respect to the likely future success of the creators' work (see above discussion on the information problem facing both the creator and exploiter). While the impact of rules on the transfer of rights on the remuneration of authors will depend on the degree to which the creator is well-informed about the market potential of her work, the rules might be particularly effective for authors that are in the early stages of their careers (who will in general be those with less bargaining power). Such creators are likely to be less well informed than the average exploiter and hence would face the greatest information problem in respect of their works and so be most at risk of signing a contract that would lead them to receive lower remuneration than would be the case under a situation of perfect information on the value of the work.

If the rules on transfer of rights are of most benefit to inexperienced authors, this may have a dynamic effect on the creative industries: individuals may be more likely to become an author if they consider that the law is protective of them. In essence, however such rules could be seen as lowering a barrier to entering the market in one of the creative sectors covered in this study, which in itself might be expected to lower the returns to participating in the sector (if demand does not increase in line with such growth in the supply).

Overall, imposing limitations on transfer of rights by requiring that different means of exploitations and their respective remuneration are clearly stated contributes to transparency as it places the author in a position of greater awareness about their remuneration expectations.

⁴⁷⁷ The extent of any such effect would depend upon the extent to which the new mode of exploitation would create the opportunity for the creator to reach new audiences. The greater the potential to reach new audiences, the greater the potential additional revenue.

4.5.2 The use of model contracts and collective bargaining agreements

The use of model contracts developed as a result of negotiations between representatives of authors and publishers can have a positive impact on the level of remuneration of authors for the following reasons:

- By providing a standardised format of agreement, they decrease the need for extensive negotiations, and transaction costs.
- They act as a focal point to authors for forming expectation on “typical” contractual rights and duties. As such, they alleviate asymmetric information problems and decrease the need for seeking legal advice.

Notwithstanding the above, there is also the need to emphasise that the positive impact of model contracts can be significantly reduced (or in some cases, be even negative) for a number of reasons:

- Model contracts might be used simply as a starting point in the negotiation process but, in practice the agreements between authors and exploiters could still rely on tailored contracts.
- The potentially positive impact of model contracts and relies on the assumption that they are well-drafted and effective in helping creators to make more accurate judgments on the values of their works and to assess the extent to which the proposed remuneration reflects that value. If this is not the case, model contracts and might provide authors with a sense of false security and lead to sub-optimal remuneration outcomes.

With regards to collective bargaining agreements, these could improve remuneration for authors in the following way: in countries where trade unions play a significant role, collective bargaining agreements should be expected to counterbalance the high negotiating power of exploiters and thus have — on average — a positive impact on authors’ remuneration.

While for collective bargaining agreements the following confounding arguments can be put forward:

- Trade unions might have negative influence on overall economic efficiency because of the fact that they distort labour markets and create deadweight losses to society by raising the level of remuneration for their members above that which would obtain in a competitive market.
- Authors who expect to have above average chances to become successful may have limited incentives to participate in collective agreements. They would only have an incentive to participate if the overall improvement in general remuneration terms (due to the collective agreement) was more substantial than the benefit they would expect to receive otherwise by being successful. In light of the above, if participation is optional, there is a chance that forcing collective agreements would tend to generate participation incentives for authors who expect to be below average — with the result that publishers could use membership of a collective agreement as a screening device to weed out lower quality authors. If, on the other hand, participation is mandatory (as it is the case e.g. in France), collective bargaining may have a differential impact on authors as this could be seen as representing a form of cross-subsidisation where less successful authors benefit at the expenses of the more successful ones.

4.5.3 Maths Example 3: Collective bargaining agreements

Suppose that there is an option for collectivisation of the value of authors’ works. Call the organisation that bargains on behalf of authors and then divides whatever royalties it

generates amongst authors “the Union”. Suppose that operates as follows. Call the total profits from the works of all authors in the sector is Π_T . So

$$\Pi_T = (k - 1)\Pi_L + 2\Pi_H + (k + 1)\epsilon$$

Then, suppose that, if all k authors join the Union the total share of Π_T the Union secures is z . And suppose that the Union distributes $z\Pi_T$ amongst the members according to some distribution rule $D(z\Pi_T)$. So, for example, an extremely simple distribution rule might be that the members each get an equal share, so if all k authors joined we would have

$$D(z\Pi_T) = \frac{z\Pi_T}{k}$$

Under this simple scenario, we would then have that if everyone joined the Union, each individual would receive

$$\frac{z}{k}[(k - 1)\Pi_L + 2\Pi_H + (k + 1)\epsilon] = \frac{1}{k}(2z\Pi_H - 2\epsilon) + \frac{(k-1)}{k}(z\Pi_L - \epsilon) \quad [\text{eq. 3}]$$

Now the question is, would every author in fact join? In particular, would any author join that thought she was more likely than the average author to be of high quality? So suppose that each author ascribes a subjective probability, p to her likelihood of being of high quality, would she join if $p > 1/k$? Consider someone who believed herself averagely likely to be the high quality author, so $p = 1/k$. And suppose that if one did not join the Union, then one agreed to a single royalty rate, q , for one’s works. What would the Union have to achieve, by way of share for its members, and how would it have to distribute that share amongst members for such an average person to want to join? Let’s take the simple distribution rule above and assume that the Union secured only the same royalty rate, q , as would be achieved anyway. Then someone who believed herself average and who did not join the Union would expect to get

$$\begin{aligned} & p(2q\Pi_H - 2\epsilon) + (1 - p)(q\Pi_L - \epsilon) \\ &= \frac{1}{k}(2q\Pi_H - 2\epsilon) + \frac{k - 1}{k}(q\Pi_L - \epsilon) \end{aligned}$$

which is the same as in the previous section above. Someone who joined the Union would get

$$\frac{1}{k}(2z\Pi_H - 2\epsilon) + \frac{(k-1)}{k}(z\Pi_L - \epsilon) = \frac{1}{k}(2q\Pi_H - 2\epsilon) + \frac{(k-1)}{k}(q\Pi_L - \epsilon)$$

or in other words, exactly the same as if she did not join the Union. If the Union secures any higher remuneration rate — if $z > q$ — then this person gains by being a member of the Union.

But if she believes herself more likely than average to be of high quality, $p > 1/k$ then under this distribution rule, to guarantee that it is advantageous to join the Union it has to be able to secure at least as much increase in the royalty rate as the degree to which this person believes herself more likely to be a best-seller — i.e. $z/k > pq \Rightarrow z/q > pk$. That means that if an author is very confident that she is of high quality (so $p \approx 1$), it will almost never be advantageous to join a Union under this distribution rule.

That means that to induce high quality authors to join, such a Union may need to offer a distribution rule according to which more successful authors receive a higher share of total royalties. But if a successful author has the possibility to demand a higher royalty rate for second or later works, having established a reputation as high quality, that will make it even less attractive to join the Union. If a publisher is willing to provide a very successful author with a very high royalty rate, that will tend to mean only lower quality authors will seek to join a Union.

4.6 Conclusions

As illustrated in this section, there are a number of factors that will contribute to determining the remuneration an individual author receives for their creations. It is important when analysing actual levels of remuneration to consider all these factors together. This is why developing this theoretical framework to identify the potential drivers is a key stage in the analytical process and must be conducted prior to an examination of the data. In particular, not accounting for all possible factors could result in drawing erroneous conclusions as to the impact of the national approach to ensure remuneration. Thus, while we are primarily focussed on the role of the national legislative context and use of collective bargaining agreements etc., we have also included in our framework the role of other factors, such as the valuation of the creation and the bargaining power of each party. The detailed theoretical framework illustrated in Figure 4.3 illustrates the potential influences on negotiation outcomes.

We have discussed in this section the likely impact each of these factors will play in determining the rate of remuneration authors achieve in their contracts. We summarise in the table below these relationships and indicators of the factors described in the theoretical framework.

Table 4.2: Influences on remuneration and potential indicators of their existence/strength

| Influence on remuneration | Source | Expected impact on remuneration | Indicator |
|--|---|---------------------------------|---|
| Creator's expected value | Experience of creator | + | Number of years in industry / Number of books published (for book authors only) |
| | Presence of intermediary agents | + | Whether used an intermediary/agent in the negotiations |
| Creator's bargaining power | Creator's prior success | + | Proxied by number of years in industry / Number of books published (for book authors only) |
| | Negotiating ability | + | Experience; whether an intermediary agent is used |
| | Outside options | + | Proxied by the number of enterprises in the sector |
| Exploiter's bargaining power | Size of counterparty | - | Whether the exploiter (employer, commissioner, publisher) is a large national or international company |
| | Market power | - | Proxied by per number of firms operating in the relevant industry |
| Other economic variables | Market size | + | Proxied by: household consumption on recreational and cultural activities, gross operating rate, average turnover |
| Collective bargaining framework | Extension of branch agreement to sector | ? | From legal review (excluding journalists) |
| | Model contracts | ? | From legal review |
| | Active trade unions | ? | From legal review |
| | Freelancers presumed employees | ? | From legal review (for journalists only) |
| Legal framework | Limitations on scope | + | From legal review |
| | Limitations on future works | + | From legal review |
| | Restrictions on scope of transfer | + | From legal review |

^a This is not the expected impact on total remuneration but on the rates applied in the contract – the total remuneration will be dependent on sales, i.e. for a constant level of sales remuneration would be affected in the following way.

Note: It was not possible to specify indicators of the exploiters' expected value because only creators were potential respondents to the survey. Our theoretical framework shows that the exploiters' expected value will be hidden information to the creator and hence we could not secure such information through the survey.

5 Approach to Statistical Analysis

5.1 Introduction

This chapter details the approach that has been implemented for the statistical analysis of authors' income that is presented in the next chapter. Firstly, the types of variables required for the analysis, as suggested by our analytical framework, are described. Next, a list of the data sources that will be required is presented, followed by a detailed description of how each variable has been constructed. Lastly, we examine the quality of the data collected from the authors' survey and identify any caveats that might be present.

At a general level, the approach we have taken is to use the legal analysis and the theoretical analytical framework to establish a set of theories which we use in our statistics to structure the parameters used in our econometric model. In that sense our approach is the standard parametric structural econometrics typically used in policy analysis.⁴⁷⁸ The statistics analysed later consider to what extent these structural equations are "statistically significant" — i.e. whether it is statistically certain that the coefficients on the parameters we deploy are not zero, and thus whether the correlations or causal factors discussed in our theories are in fact supported by the data.⁴⁷⁹

5.2 Variables required for the analysis

In section 4 we describe the analytical approach that will be adopted for this study. Our approach necessitates the collection of data relating to a number of variable categories which are listed below.⁴⁸⁰

- A creator's expected value is likely to have a positive impact on remuneration and is reflected by the experience of the creator and the use of a representative. Indicators that can be used in this case are the number of years that the creator has been in the industry and whether they have used a representative during negotiations.
- The higher the creator's bargaining power the higher their remuneration is expected to be. Bargaining power is affected by the creator's prior success (proxied by number of years in the industry), their negotiating ability (affected by education, age, experience and use of a representative), the presence of collective bargaining agreements (examined in the legal review) and the availability of any outside options (affected by the number of possible exploitation channels).
- The higher the exploiter's bargaining power, the lower the creators' expected remuneration is going to be. Bargaining power of exploiters depends on their prior success (reflected in the type of counterparty that an author faces) and their position in the market (reflected in

⁴⁷⁸ There is an alternative "non-parametric" approach. As well as having theoretical weaknesses for our purposes in this study, such an approach would not have been feasible given the limited data we have had available.

⁴⁷⁹ In that sense, although we often use phrases such as "consistent with expectations" in what follows, our procedure, as in standard, probes the robustness of our models by attempting to refute them (to show that we cannot prove the coefficients on our parameters might not be zero) rather than to confirm them.

⁴⁸⁰ Some of the variables mentioned in this section are likely to be associated with more than one categories.

terms of market concentration). Nevertheless, the impact of exploiters' bargaining power is expected to vary depending on the extent of creators' bargaining power.⁴⁸¹

- The legal framework, through its various constituent clauses safeguarding authors' rights is expected to have a positive influence on remuneration. The constituents of the legal framework include clauses regarding the ownership, nature and scope of transfer of rights as well as specifying the role of trade unions, among other things.

5.3 Data collection

This section contains a description of our approach to collecting the data required to populate the variable categories listed above.

5.3.1 Authors' income

Information on authors' income was gathered through an online survey targeted to different categories of authors. The survey questions covered different types of income categories as explained below:

- income from advance payments (for book authors);
- income from royalty payments (for book authors);
- CRMO income (for all authors);
- income from first language and second language translations (for translators);
- commissioned income (for journalists and visual artists);
- income from non-commissioned work (for journalists and visual artists); and
- total income.

Consistently, across all categories of authors, the final question expressly investigates the author's annual total income; "authors of books" is the only category where the final question differs from other categories. In fact, the final question in the survey of authors of books investigated the total income received from the last published book. Hence, for reasons of comparability it is more straightforward to use total annual income for journalists, translators and visual artists in our analysis.

On the other hand, for authors of books, a new variable is also constructed, defined as the sum of advance payments, additional payments and income received from CRMOs. Both income variables for book authors will be analysed and used as dependent variables in our models. This choice is driven by two factors: firstly, the number of responses provided for the question on total earnings from the latest published book by authors of books is negligible; secondly, the sum of the three sources of income may be a good proxy for an author's total income (and not just the total income from the latest publication).

Additional income questions were posed in the survey (e.g. income from commissioned work and income from CRMOs) but are of less significance compared to the total income question as they are considered parts of total income themselves.

The choice of our final dependent remuneration variable was based on the availability of data and focused on ensuring the overall representativeness of our sample. To this end, average annual income received from both commissioned and independent work (i.e. total income) was used as the relevant question was asked consistently across surveys for different author categories.⁴⁸² Moreover, using such a measure as our dependent variable falls in line with

⁴⁸¹ As the outcome of such interactions is also expected to be author-specific as well as depend on national factors, we plan to address this issue in section 6.3 by conducting a multivariate econometric analysis, thus accounting for such external influences.

⁴⁸² In the special case of authors of books, we used the total earnings received from the latest publication. Due to the few available observations, when estimating models solely for authors of

literature analysing the effects of legislation on the income of creative industries participants.⁴⁸³

5.3.2 Domestic legal indicators

The focus of our research is to understand the impact of the legal framework on the remuneration of authors. As explained in the previous chapter, we expect that Member States with a higher level of legal protection will be characterised by higher average incomes. This is due to legal protection resulting in increased bargaining power on the author's side and, hence, in an enhanced capacity to impose favourable contract terms when negotiating remuneration. Accordingly, the above motivates the creation of a legal indicator that takes into account such legislative differences within the countries under examination.

In addition to the formal legal framework we must consider practices across Member States. In particular, the extent to which collective bargaining arrangements affect contractual practices. In general, we would expect collective bargaining agreements to lead to higher average remuneration. This is due to the fact that collective bargaining enhances authors' bargaining power in negotiations and may also assist in overcoming potential information problems. Accordingly, a collective bargaining indicator is constructed taking into account the divergent contractual practices across the countries under examination.

5.3.3 Authors' demographic characteristics

In order to account for the potential factors (outside the legal framework) which might affect levels of remuneration, background information on the authors was needed. Therefore in the survey we also gathered information on the following author's characteristics:

- age;
- Member State of residence; and
- their professional experience (i.e. the number of years in the industry).

5.3.4 Economic variables at the sector and domestic market levels

When analysing authors' remuneration, we expect sector and country specific dynamics to have a significant effect. Accordingly, various economic variables are collected for each industry at the country level. These include:

- measures of consumption levels in recreational and cultural activities;
- measures of the financial performance of the examined sectors; and
- market concentration measures for the sectors of interest.

More specifically, household cultural consumption is expected to positively affect remuneration as higher values would suggest a larger market for the author's product leading to greater expected sales of the author's work and, hence, higher income.

Lastly, the degree of concentration within the examined industries enables us to understand the extent of outside and inside options at the authors' disposal; higher levels of outside and inside options give authors higher bargaining power in the negotiation phase. Evidently,

books, our dependent variable consisted of the sum of advanced, additional and collective management organisation payments for the latest publication.

⁴⁸³ Hurt and Schuchman (1966) "The Economic Rationale of Copyright", American Economic Review. Landes and Posner (1989), "An Economic Analysis of Copyright Law", 18 J. Leg. Stud and (2003), "The Economic Structure of Intellectual Property Law", Harvard University Press.

increased levels of market concentration are expected to negatively affect authors' remuneration as the number of available options would be limited.

5.3.5 Role of intermediaries

A set of other explanatory variables that may affect authors' remuneration are taken into account. Specifically, during the negotiation process an information problem is expected to manifest due to the imperfect information held by both parties in the transaction. Consequently, there exists uncertainty regarding the expected value of the author's work, ultimately affecting the level of remuneration. A crucial aspect of the information problem relates to the fact that the market success of the work cannot be estimated ex ante. Accordingly, each party will estimate its expectation based on the information that the other party holds and its judgement on the likely market success of the work.

The ex post accuracy of the latter estimate may be improved given the author's experience and any intermediaries that may be used during the negotiation process as a means of affecting the aforementioned expected values. These factors will influence the determination of the expected value of the author's work and, hence, the agreed remuneration. Accordingly, within the context of this study, in addition to accounting for the authors' experience⁴⁸⁴ we also account for the use of a third-party representative, or an agent, when analysing the determinants of remuneration.

5.4 Data sources

To collect data on the above variables we used:

- a survey designed by Europe Economics, in coordination with European representative bodies and the European Commission;
- a legal survey conducted by the University of Amsterdam and its legal correspondents; and
- existing databases (e.g. Eurostat).

5.4.1 Survey methodology

The survey was designed through a series of interactions with European level representative bodies and the European Commission. Initially, Europe Economics created a first draft of the authors' survey which was split in four different surveys:

- authors of books and scientific/academic articles for journals;
- translators (both literary and audio-visual);
- journalists (both print and audio-visual); and
- visual artists (designers, illustrators and photographers).

Prior to the survey drafting stage, several European representative bodies were contacted and were provided with a description of the scope of the study and with a detailed timeline which included intended survey deadlines. This initial contact was also used in order to ensure the representative bodies' participation.

The following list presents the representative bodies that were engaged in the process:

- European Writers' Council (EWC);
- European Council of Associations of Literary Translators (Conseil Européen des Associations de Traducteurs Littéraires – CEATL);

⁴⁸⁴ We consider authors as experienced if they have been practicing their main activity for at least ten years. In the special case of authors of books, their experience threshold is set to at least ten prior publications.

- Audio-Visual Translators Europe (AVTE);
- European Federation of Journalists (EFJ); and
- European Visual Artists (EVA).

The interaction with the above organisations offered valuable insight and significantly improved the survey design process. Constructive feedback was collected and reviewed systematically and resulted in an adjusted version of the original surveys. These adjusted surveys were then finalised with the European Commission before being sent out to get professionally translated.⁴⁸⁵ On 24th April 2015, the surveys were uploaded on the EUSurvey application and a series of notifying e-mails was sent out to a list of national and European bodies (see chapter 9) to announce that the survey was live and accessible. The initially indicated deadline for the survey was 31st May 2015 and a reminder was sent to national bodies that were initially contacted as well as the European representative bodies. The deadline was eventually extended to 21st June after consultation with representative bodies and the European Commission.⁴⁸⁶

Author categorisation

The following process was used, based on each different survey, in order to finalise the classification of each type of author.

Authors of books and academic/scientific articles for journals

The classification is based on the question: "Which of the following activities are you most frequently involved in?" Respondents were able to answer both the survey for "Authors of books" and the one for "Authors of academic/scientific articles for journals". Respondents who chose to answer both have been classified both as "Authors of books" and "Authors of journal articles". Academics who author research journal articles and academics who author research books and journal articles are classified as "Authors of journal articles". Academics who author research books, academics who author research books and journal articles and authors of books (fiction, non-fiction, educational books/textbooks and literature for children and young adults) are classified as "Authors of books".

Translators

The classification of translators is based on the question: "Which of the following activities is the primary activity you are involved in as a translator?" It is carried out as follows: dubbing (lip synch or voiceover) translation, inter-lingual subtitling, live subtitling translation for live broadcasts translator, other category of audio-visual translation, subtitle translation for the deaf and hard of hearing and translation of voiceover script for documentaries and films are classified as "Audio-visual translators".

The remaining options (translation of poems, translation of fiction books, translation of non-fiction books, translation of educational books/textbooks, translation of books for children and young adults, translation of academic/technical books, translation of newspaper/magazine articles, advertising / commercial translation, other category of literary translation) are classified as "Literary translators".

Journalists

The classification of journalists is based on the question: "Which of the following activities is your primary activity as a journalist?" It is carried out as follows: magazine and periodicals journalists, newspapers journalists, web journalists and other (according to the criteria explained below) are assigned to the category "Print Journalists".

⁴⁸⁵ The surveys were translated in French, German, Spanish, Italian, Polish, Hungarian, Danish and Dutch by a professional translation company.

⁴⁸⁶ The extensions took place in order to address some technical issues and in order to increase the number of responses.

Photo, radio, video journalists and other (according to the criteria explained below) are assigned to the category "Audio-visual Journalists".

With respect to the "Other" category the following criteria are imposed. Before being asked about their "primary" category, respondents are asked to indicate all activities in which they are most frequently involved as journalists. If their answers to this question allow for unique categorisation then they are classified accordingly. If not, we refer to the question: "In what terms do you measure the length of an assignment?" to assign the respondent to a category. If none of the above criteria is helpful to provide a classification, the respondent is assigned to the category "Unknown".

Visual artists

The classification is based on the question: "Which of the following categories of visual artists best describes your profession?" Respondents were classified in one of three categories, depending on their answer:

- Designers.
- Illustrators.
- Photographers.

Survey characteristics

The amount of time generally required to complete the survey ranged from 10 to 15 minutes for each of the surveys.

The survey for authors of books and academic journals was dynamic in the sense that, depending on whether the respondent was an author of journal articles or books, different set of questions had to be answered. In relation to their activity, respondents had to respectively answer 12 or 26 questions. In the case that the respondent was both an author of journal articles and books, both sets of questions had to be answered. The basic structure of the survey was as follows: after some questions on background information of the respondent, more specific question related to the author's activity had to be answered; the last part of questions was dedicated to the type of contract negotiated and specific information on the income of the respondent.

The survey for journalists was also dynamic and it created a dependency based on whether the respondent was an employed journalist or a freelance journalist. After initial questions on background information, some questions on the type of contract followed, both for employed and freelance journalists. Following questions on income were dedicated to freelance journalists. In the case the respondent was involved in both activities, all the questions had to be answered. Employed journalists had to answer 8 questions, freelance journalists had to answer 26 questions and journalists who classified themselves as both employed and freelance journalists had to answer 28 questions (income questions were related to the freelance activity).

The structure of the survey for translators resembles the journalists' one; in particular the set of questions on income had to be answered only by respondents who were either freelance translators (only) or both employed and freelance translators. Employed translators had to answer 10 questions, freelance translators had to answer 32 questions and both employed and freelance translators had to answer 34 questions.

In the survey for visual artists, respondents to the survey followed different question paths depending on what type of visual artist they identified themselves as. The dynamic structure for the visual artists' survey resembles the one for translators and journalists: income questions were reserved for respondents who were either only freelance visual artists or both employed and freelance visual artists. Employed visual artists had to answer 9 questions, freelance visual artists had to answer 25 questions and both employed and freelance visual artists had to answer 27 questions.

5.4.2 Caveats

Technical error

Due to a technical error in the survey design any respondents answering “None of the above”, in questions where this option was available, were not able to complete the survey as their responses were terminated at that point. This issue was addressed before the survey deadline, European level bodies were notified and assisted in instructing respondents who faced that issue to complete the survey again.

Therefore, in order to avoid double counting of respondents and because the respondents affected by the technical error were not able to provide income responses, the problematic observations have been excluded from the statistical analysis.

Representativeness

The distribution method meant that we have no control over representativeness of sample, both across countries and within each country. The impacts of this weakness are that 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. This potential lack of representativeness is an important consideration when interpreting the results of our statistical and econometric analysis, particularly for those countries for which we have a relatively small number of responses (since outliers from the population would have a greater influence on the nature of the sample distribution in such cases).

In section 5.6 we assess the extent to which the data collected on average income is representative by examining sector level income per country and the distribution of responses by years of experience.

Bias

Related to the above point, we are concerned that 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.

Missing values

Due to the complexity of some of the questions in the survey we chose to make certain questions non-mandatory. Many respondents chose not to answer some or all of those questions which created missing values in our dataset.

5.5 Creation of indicators

This section covers the approach implemented in creating the various indicators that will be used in our statistical analysis based on our data requirements and on the final set of collected data.

5.5.1 Economic indicators

The use of the following economic variables is highlighted in section 5.3.4 as an important aspect of our statistical analysis:

- measures of consumption levels in recreational and cultural activities;
- measures of the financial performance of the examined sectors; and
- market concentration measures for the sectors of interest.

The first indicator constructed made use of data on household cultural consumption obtained from Eurostat. Data obtained for the sector consumption indicator (as well as the following two

indicators in this section) were adjusted using Eurostat data on Purchasing Power Parity (PPP) such that the monetary values employed in the models are in terms of Purchasing Power Standard (PPS).

The second indicator on financial performance was created based on the financial performance of the publishing and broadcasting sectors. More specifically, it was constructed to capture the sector's gross operating rate: its value added (minus personnel costs) divided by turnover.⁴⁸⁷

Lastly, due to data unavailability issues, the calculation of the market concentration indicator could not be based on traditional measures such as the C4 ratio or the Herfindahl-Hirschman Index. Instead, alternative indicators were constructed such as average sector turnover and the average sector gross operating surplus.

5.5.2 Legal indicators

As a result of collaborative work between UVA and Europe Economics, two indicators have been constructed reflecting the degree of protection offered by the legal frameworks in the countries under examination as well as the extent of collective bargaining. These two variables constitute the two key points of interest in our attempt to examine the determinants of authors' remuneration.

The legal indicator is constructed as the sum of individual scores for specific legal provisions across countries. The legal analysis indicated that certain provisions would have a more prominent effect on authors' remuneration than others.⁴⁸⁸ Therefore, we use the legal provisions identified in Chapter 2 to construct the legal indicator, presented in more detail below:

- Limitations on the scope of transfer of rights taking the value of zero when the law does not state specifically in what scope (e.g. territory, work, tenor, language) the transfer of rights needs to occur (UK, IE, IT), 0.5 when the law does not expressly mandate a limitation on scope but requires that any interpretation of the scope should be done restrictively (NL, DE, HU) and one when the law fully states the scope of transfer (FR, ES, PL, DK).
- Limitations on future forms taking the value of zero when the law does not specify the future forms of exploitation (NL, UK, IE), 0.5 when the transfer of rights is interpreted restrictively (DK) and one when the law specifically states the future forms of exploitation (DE, FR, ES, IT, PL, HU).
- Limitations on future works taking the value of zero when the law does not establish that any transfer of copyright has to be specific as regards future works (NL, UK, IE, DK) and one if it does (DE, FR, ES, IT, PL, HU)

Similarly, the collective bargaining indicator is constructed as the sum of individual scores for specific collective bargaining agreements in place. The latter differ by country and by author category. They consist of extensions of branch agreements to sector, model contracts and the role of trade unions. In the special case of journalists, extensions of branch agreements to sector are replaced by provisions presuming freelancers as employees and restrictions on the scope of transfer of rights.

⁴⁸⁷ The author categories covered in this study are classified, for the purposes of this study, under two NACE industry codes in order to reflect the sectors that are more relevant for them. For book authors, visual artists, literary translators and print journalists this is J58 (Publishing of books) while for audio-visual translators and audio-visual journalists J60 (Programming and broadcasting activities) was considered more relevant.

⁴⁸⁸ These legal provisions relate to the existence of formalities on the transfer of rights, limitations on the scope of future forms and limitations on the scope of future works.

Construction of the legal indicator

Our approach to setting the values of the 'legal strength' indicator was to identify whether certain key provisions of copyright law apply to a given country.⁴⁸⁹ To this end, the legal indicator does not vary across author categories. Our legal experts then gave a score of zero, half, or one based on the extent to which each of these provisions are active in a given country. The scores assigned to each provision were added together to give an "aggregate" score out of three. The higher the score, the stronger the legal framework. The final legal indicator is presented in the table below:

Table 5.1: Legal Indicator

| MS | Limitations on scope of transfer | Limitations on future forms | Limitations on future works | Outcome |
|----|----------------------------------|-----------------------------|-----------------------------|---------|
| NL | 0.5 | 0 | 0 | 0.5 |
| DE | 0.5 | 1 | 1 | 2.5 |
| FR | 1 | 1 | 1 | 3.0 |
| UK | 0 | 0 | 0 | 0.0 |
| IE | 0 | 0 | 0 | 0.0 |
| ES | 1 | 1 | 1 | 3.0 |
| IT | 0 | 1 | 1 | 2.0 |
| PL | 1 | 1 | 1 | 3.0 |
| HU | 0.5 | 1 | 1 | 2.5 |
| DK | 1 | 0.5 | 0 | 1.5 |

Note: For all columns 0 indicates no restriction on contractual form, whereas 1 indicates that certain statutory restrictions apply. 0.5 constitutes an in-between situation where certain limitations on the contractual freedom have been recognised by courts, whereas 0 indicates the absence of provisions.

Construction of collective bargaining indicator

The collective bargaining indicator was 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. These are expected to vary across countries and across author categories different scores were assigned to each individual provision based on the country under examination and whether the author category relates to visual artists or book authors (these two were grouped together), translators (audio-visual and literary translators were grouped together) and journalists (audio-visual and print journalists were grouped together). Lastly, similar to the construction of the legal indicator, the individual scores were summed to form the "aggregate" score. The final form of the collective bargaining indicators are presented in the tables below:

⁴⁸⁹ The general factors are: formalities for the transfer of rights; rules on form of payment (e.g. lump sum, royalties etc.); limitation on scope; limitation on future forms; limitation on future works; obligation to publish or non-usus and "best seller" - type clause.

Visual artists and book authors

Table 5.2: Collective Bargaining Indicator for visual artists and book authors

| MS | Extension of branch agreement to sector | Model contract | Role of trade unions | Outcome |
|----|---|----------------|----------------------|---------|
| NL | 0 | 1 | 1 | 2.0 |
| DE | 0 | 1 | 1 | 2.0 |
| FR | 1 | 0 | 0.5 | 1.5 |
| UK | 0 | 0 | 0.5 | 0.5 |
| IE | 0 | 0.5 | 0.5 | 1.0 |
| ES | 0 | 1 | 1 | 2.0 |
| IT | 0 | 0 | 0 | 0.0 |
| PL | 0 | 0 | 0 | 0.0 |
| HU | 0 | 0 | 0 | 0.0 |
| DK | 0 | 0 | 0 | 0.0 |

Note: Only the French legislation extends the terms and conditions applicable to members of collective agreements in the sector also to non-members in the same sector. In the case of model contracts 0 indicates that model contracts are hardly available, 0.5 indicates that some model contracts are available and 1 indicates that model contracts are available. In the case of the role of trade unions 0 indicates the absence of active trade unions, 0.5 indicates the existence of active trade unions with no/little tangible results achieved and 1 indicates the existence of active trade unions with some tangible results achieved.

Audio-visual and literary translators

Table 5.3: Collective Bargaining Indicator for audio-visual and literary translators

| MS | Extension of branch agreement to sector | Model contract | Role of trade unions | Outcome |
|----|---|----------------|----------------------|---------|
| NL | 0 | 1 | 1 | 2.0 |
| DE | 0 | 1 | 1 | 2.0 |
| FR | 1 | 1 | 1 | 3.0 |
| UK | 0 | 1 | 1 | 2.0 |
| IE | 0 | 0 | 0.5 | 0.5 |
| ES | 0 | 1 | 1 | 2.0 |
| IT | 0 | 0 | 0 | 0.0 |
| PL | 0 | 0 | 0 | 0.0 |
| HU | 0 | 0 | 0 | 0.0 |
| DK | 0 | 0.5 | 0 | 0.5 |

Note: Only the French legislation extends the terms and conditions applicable to members of collective agreements in the sector also to non-members in the same sector. In the case of model contracts 0 indicates that model contracts are hardly available, 0.5 indicates that some model contracts are available and 1 indicates that model contracts are available. In the case of the role of trade unions 0 indicates the absence of active trade unions, 0.5 indicates the existence of active trade unions with no/little tangible results achieved and 1 indicates the existence of active trade unions with some tangible results achieved.

Audio-visual and print journalists

Our collective bargaining indicator for audio-visual and print journalists does not take into account possible extensions of branch agreements to sector. Rather, restrictions on the scope of transfer of rights and provisions presuming freelancers as presumed employees were taken into consideration when constructing the indicator.

Table 5.4: Collective Bargaining Indicator for audio-visual and print journalists

| MS | Freelancers presumed employees | Model contract | Restriction on scope of transfer | Role of trade unions | Outcome |
|----|--------------------------------|----------------|----------------------------------|----------------------|---------|
| NL | 0 | 1 | 0.5 | 0 | 1.5 |
| DE | 1 | 1 | 0.5 | 0 | 2.5 |
| FR | 1 | 1 | 0.5 | 1 | 3.5 |
| UK | 0 | 0 | 0 | 1 | 1.0 |
| IE | 0 | 0.5 | 0 | 0.5 | 1.0 |
| ES | 0.5 | 0 | 0 | 1 | 1.5 |
| IT | 0 | 0.5 | 0 | 0.5 | 1.0 |
| PL | 0 | 0 | 0 | 0 | 0.0 |
| HU | 0 | 0 | 0 | 0 | 0.0 |
| DK | 0 | 1 | 0.5 | 1 | 2.5 |

Note: In the case of freelancers presumed employees terms and conditions of some freelancers are deemed by legislation to be those of an employed author (1), or similar (0.5), or not (0). In the case of model contracts 0 indicates that model contracts are hardly available, 0.5 indicates that some model contracts are available and 1 indicates that model contracts are available. In the case of the role of trade unions 0 indicates the absence of active trade unions, 0.5 indicates the existence of active trade unions with no/little tangible results achieved and 1 indicates the existence of active trade unions with some tangible results achieved. In the case of restrictions on scope of transfer the law or model contracts restrict the transfer of the scope of journalists' rights to that of first publication only (1), or does not restrict it but further uses require additional remuneration (0.5), or does not restrict it (0).

5.6 Overview of data and data reliability

In the following paragraphs the quality of income data collected from the authors' surveys is explored through the use of descriptive statistical information, examining, among other things, the representativeness of responses across different countries.

We conducted a thorough review of the survey responses to ensure the quality of the final data set used. This process resulted in the exclusion of a number of observations from the data set based on a set of criteria that are described below.

During the data cleaning process, some observations were dropped and are not presented in the rest of the section. In particular, respondents who were not residents in the countries that are covered by the study and indicated their country of residence as "Other" were dropped from the sample as an analysis of the effect of Member State legal frameworks on their remuneration would not be possible.

Furthermore, some journalists responded "Other" with regards to both their primary activity (where only one selection was allowed), as well as their main activities (where multiple activities could be selected). In cases where the primary activity was "Other" but where the multiple selection of main activities indicated whether the journalists belonged to the print or the audio-visual sector, observations were classified accordingly. If an observation could not be classified in this way, the next step was to look at the main measure of length for a typical assignment. In some cases, a respondent's answer to this question enabled classification (e.g. when the answer was "minutes of audio-visual recording"); in other cases where classification was not possible, the observations were dropped from the sample.

Respondents who provided negative income figures were also excluded from the analysis. The income questions specified that income received (e.g. for assignments, independent work or from CRMOs) was to be reported rather than a calculation of net income (profit) from engaging in the activity.

Lastly, a few very pronounced outliers were identified, deemed as too extreme, and thus removed from the final data set as they would disproportionately affect the analysis. This does not imply that every observation that was considerably higher than the rest was excluded;

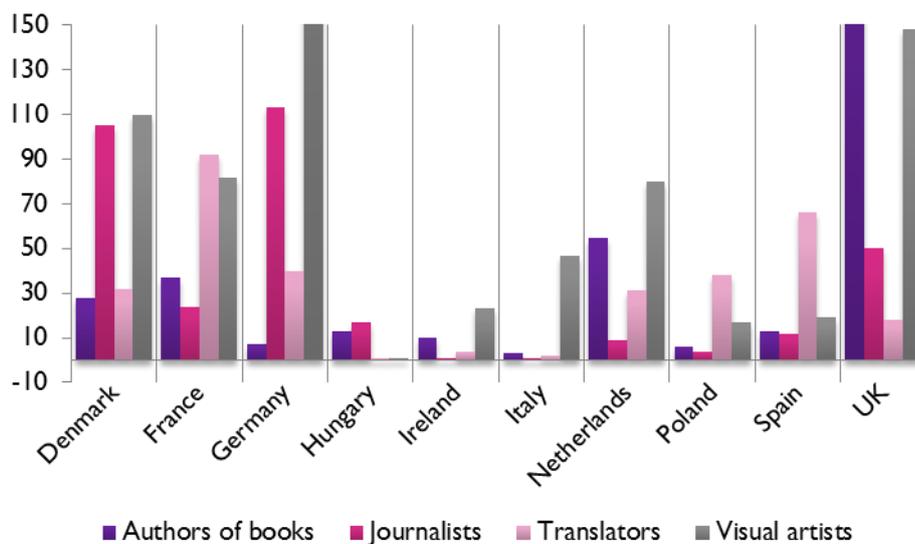
judgment was exercised in this process with a cut-off point developed for income levels exceeding €2 million.⁴⁹⁰

5.6.1 Number of responses

The graph below shows the breakdown of our 2,281 survey responses by country and type of profession. All survey respondents are displayed apart from the ones who are dropped from our analysis (as described above). For ease of comprehension, the maximum number presented on the vertical axis is 150, as the number of German visual artists is 605 and the one of book authors from the UK is 317, both of which are considerably higher than the rest of the categories. Visual artists are particularly well represented almost in all the surveyed countries. There is also a considerable number of book authors from the United Kingdom. Journalists are particularly well-represented in Demark, whereas translators are mostly from France. Hungary is the least represented country for almost all the categories of authors; hence, it won't appear in the majority of graphs due to the lack of data. This preliminary graph highlights two major problems:

- There is high variability among countries and categories of authors with some categories being primarily represented by just one country (e.g. book authors from the UK).
- Some categories, such as visual artists, have a consistently higher number of responses compared to other ones.⁴⁹¹

Figure 5.1: Number of respondents by country



Source: Surveys of visual artists, translators, journalists and authors of books.

Note: The number of German visual artists is 605 and the number of authors of books from the UK is 317; they are not displayed in the graph for ease of comprehension.

The two graphs presented below distinguish between author categories associated with the publishing sector (book authors, print journalist, literary translators and visual artists) and

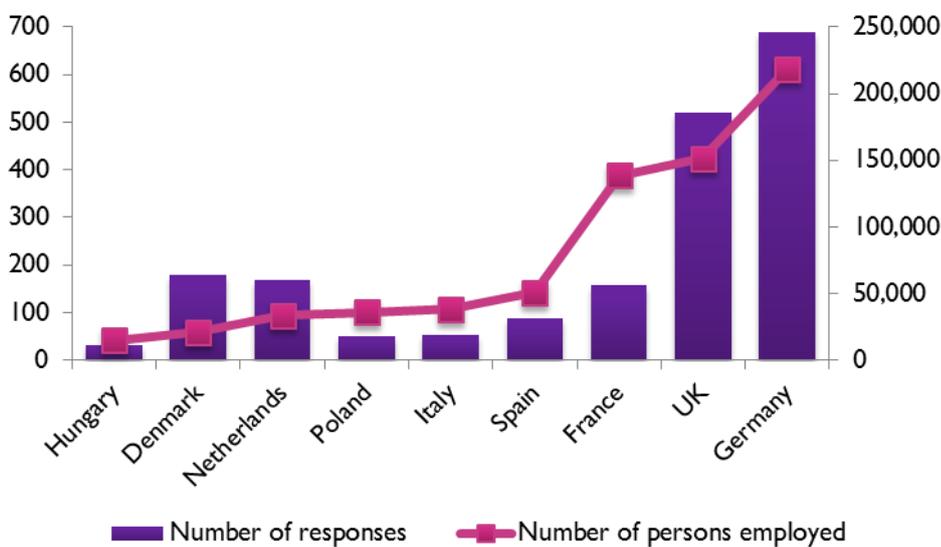
⁴⁹⁰ Respondents who were outliers in terms of income: one journalist who reported a total income over €3mln, one journalist whose commissioned income (computed as the product between the reported average fee for commissioned work and the number of fee per year) was above €10mln and a translator who reported an income over €1bln.

⁴⁹¹ The surveys were designed so as to be broad enough and apply to all the relevant author categories. As a result, it could be that certain types of authors faced difficulties responding to income questions due to measurement uncertainty. Moreover, non-disclosure preferences with regards to income-related questions may also have contributed to the observed discrepancies. Lastly, as the questionnaires were mainly made available online, access limitations may also have prevented certain types of authors from completing the surveys.

those affected by the broadcasting sector (audio-visual journalists and audio-visual translators). The graphs present the number of people employed in each sector in 2012 (NACE code J58 to proxy the publishing sector and code J60 to proxy for broadcasting) alongside the corresponding number of responses. This parallel presentation allows us to determine whether the observed response levels are in line with the number of authors employed in each sector.⁴⁹²

The number of employees in the publishing sector in Germany and the UK are two highest in our sample and this is consistent with the number of responses that we got from the two countries. There is a higher than expected number of respondents from Denmark and the Netherlands, while most remaining countries follow the expected trend. France has relatively few answers given the number of people employed in the sector which is rather close to the UK levels.

Figure 5.2: Number of responses for the print sector’s respondents and number of employees in the publishing sector



Source: Survey of authors of books, journalists, translators and visual artists.

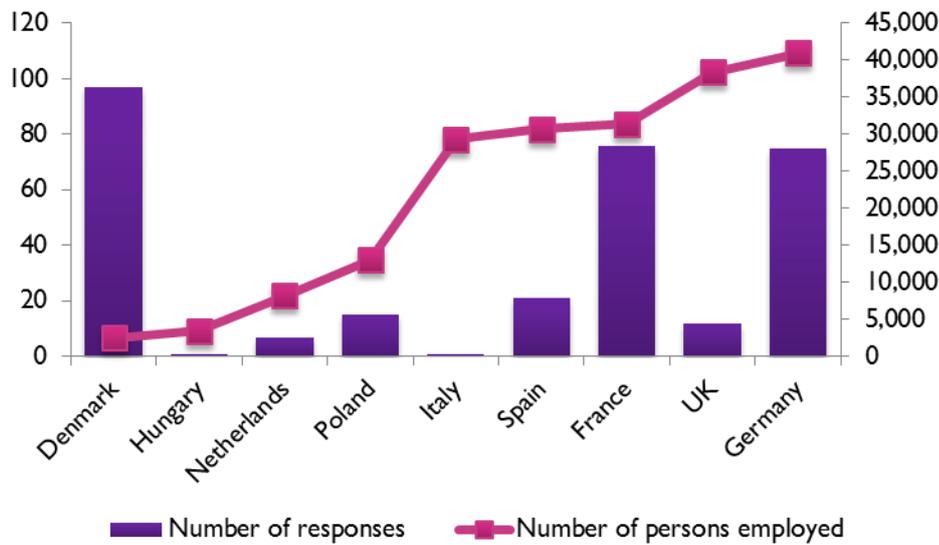
Note: Data on the number of persons employed in the publishing sector is obtained from Eurostat.

The graph below shows the number of respondents to the survey for each country for the broadcasting sector. The line shows the number of persons employed in the broadcasting sector as of 2012. In contrast to the publishing sector, the observed number of respondents is not consistent with expectations generated from the number of employed persons by country.

The highest number of respondents is from Denmark, which is actually the country with the lowest number of employed individuals in the sector. The number of responses for France and Germany is relatively high, which would be expected by considering employment levels. For the Netherlands and Poland, the low number of responses could be justified by the low number of people employed in the sector. However, Spain and the UK have an unexpectedly low number of responses and Hungary and Italy have no responses.

⁴⁹² Eurostat does not provide a more detailed breakdown of these sectors thus necessitating a grouping for the publishing and audio-visual sectors.

Figure 5.3: Number of responses for the audio-visual sector’s respondents and number of employees in the publishing sector



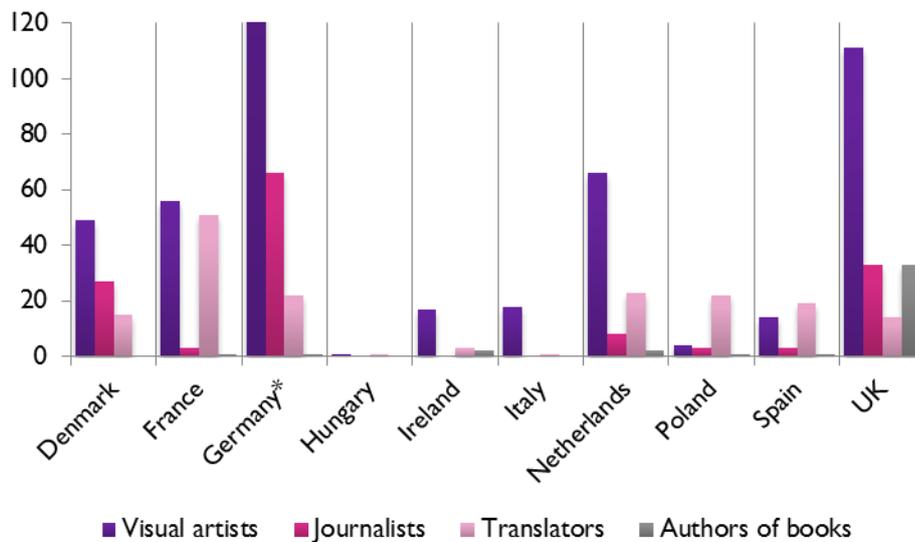
Source: Survey of authors of books, journalists, translators and visual artists
 Note: Data on the number of persons employed in the broadcasting sector is derived from Eurostat.

5.6.2 Responses to total income questions

The graph below shows the breakdown by country of respondents who answered the question on total income for each author category. The vertical axis of this graph has been adjusted in order to better present information as 435 German visual artists answered the question on total income while the second highest number was for the UK with 111 responses (it has been limited to a maximum value of 120).

Only two respondents from Hungary provided information on their total income. Ireland, Poland, Spain and Italy are the least represented countries after Hungary. For visual artists the number of responses is considerably higher than in other categories. On the other hand, response levels for authors of books were not that high, as the highest number of responses is provided by authors from the UK, whereas the numbers for the other countries are negligible (only two responses from Ireland and the Netherlands and one response from France, Germany, Poland and Spain).

Figure 5.4: Number of responses on total income question by country



Source: Surveys of visual artists, translators, journalists and authors of books.

*Note: The number of German visual artists is 435 and it is not displayed in the graph for presentational reasons.

The analysis of income question response levels reveals some notable characteristics when compared to the aggregate number of responses obtained (i.e. including the incomplete responses).

- Book authors across all countries had very low response levels for the total income question. This is particularly pronounced in the UK.
- The income responses obtained from journalists and translators were in line with the aggregate number of responses.
- Visual artists' response levels for income questions are in line with the aggregate number of responses, with the exception of Denmark (which is comparably lower).

The set of tables presented below summarises the number of responses received, by country and type of author, accounting for both incomplete responses as well as responses that were considered complete for analytical purposes (i.e. information on income was provided).

The table below shows the total number of responses by country and number of responses on income question by country. Germany and the UK stand out as having the most responses both in terms of incomplete ones (i.e. the ones missing income information) as well as complete ones (i.e. providing income information). On the other hand, Hungary, Ireland, Italy and Poland had considerably fewer incomplete responses (in the range of 32 to 65) and even fewer complete responses (10 to 34).

Table 5.5: Total number of responses by country and number of responses on income question by country

| Country | Number of responses | Number of responses on income question |
|-------------|---------------------|--|
| Denmark | 275 | 114 |
| France | 235 | 146 |
| Germany | 765 | 532 |
| Hungary | 32 | 10 |
| Ireland | 38 | 29 |
| Italy | 53 | 22 |
| Netherlands | 175 | 145 |
| Poland | 65 | 34 |
| Spain | 110 | 56 |
| UK | 533 | 408 |

Source: Survey of authors of books, journalists, translators and visual artists.

Note: For authors of books, we count as a response if the author provided either one of income from advance payments, income from additional payments or income from CMOs.

The table below shows the number of complete responses obtained by country and category of author. It brings the following points regarding Member State representativeness in our attention:

- Hungary has very low response levels for all categories of authors;
- Ireland and Italy only have a sufficiently high number of responses for visual artists (where they both have more than 15 responses);
- Poland only has a high number of responses for translators (more than 25 responses);
- Denmark has more than 15 responses for all categories but in no case does it have more than 50 responses;
- France is similar to Denmark, having a slightly higher number of responses (reaching 60 for translators) with the exception of journalists where there are only three responses;
- the Netherlands have a substantial number of responses for book authors and visual artists, less so for translators and have very few responses from journalists (eight respondents);
- Spain is has a significant number of responses from translators, considerably less so for visual artists and very few from journalists and book authors;
- Germany has the highest number of responses for visual artists and journalists, has a substantial number of responses from translators but it only has five respondents for book authors; and
- the UK has the most book authors, a considerable amount of visual artists and journalists (second to Germany in both) and a sufficient amount of translators.

Viewed from a category of author perspective:

- book authors are primarily from the UK and there are only three other countries with more than 20 responses (Denmark, France and the Netherlands);
- representativeness is a major issue for journalists, with three countries having no respondents, four countries having less than ten responses and the remaining three (Denmark, Germany and the UK) having the vast majority of responses;
- translators have a relatively better country breakdown of respondents across countries with France having the most responses and only three countries having less than ten responses (Hungary, Ireland and Italy); and
- while visual artists have the highest number of responses and only have two countries with less than ten responses the vast majority of responses is from Germany.

Table 5.6: Total number of responses on income question by country and by category of author

| Country | Authors of books | Journalists | Translators | Visual artists |
|-------------|------------------|-------------|-------------|----------------|
| Denmark | 22 | 26 | 17 | 49 |
| France | 27 | 3 | 60 | 56 |
| Germany | 5 | 66 | 26 | 435 |
| Hungary | 8 | 0 | 1 | 1 |
| Ireland | 8 | 0 | 4 | 17 |
| Italy | 3 | 0 | 1 | 18 |
| Netherlands | 45 | 8 | 26 | 66 |
| Poland | 2 | 3 | 25 | 4 |
| Spain | 7 | 3 | 32 | 14 |
| UK | 249 | 33 | 15 | 111 |

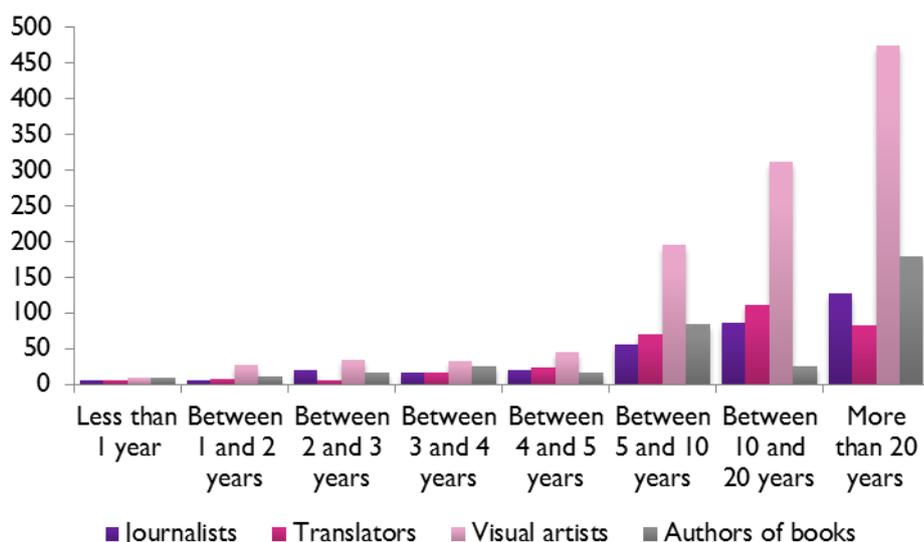
Source: Survey of authors of books, journalists, translators and visual artists.

Note: For authors of books, we count as a response if the author provided either one of income from advance payments, income from additional payments or income from CROs.

5.6.3 Experience profile of respondents

The graph below shows the number of responses by years of experience in the industry for all author categories. These ranges are the exact ranges the respondents could choose in the survey. It clearly emerges from the graph that the vast majority of respondents is represented by authors with more than 10 years of experience in the industry. Most visual artists, authors of books and journalists have more than 20 years of experience in the industry and most translators have between 10 and 20 years of experience. There is also a significant number of respondents with between 5 and 10 years of experience, whereas there is a negligible amount of respondents with less than 2 years of experience.

Figure 5.5: Number of responses by years of experience in the industry and by category



Source: Survey of authors of books, journalists, translators and visual artists

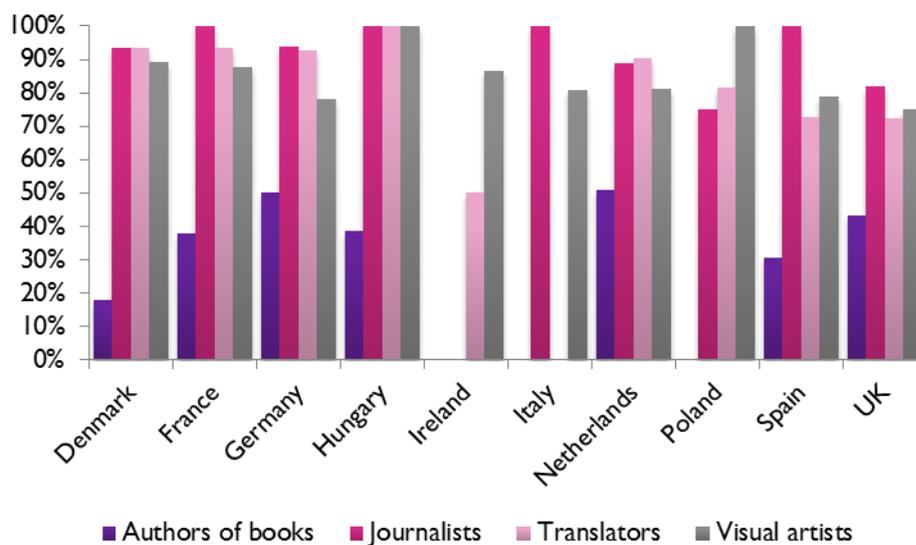
Note: Authors of books, differently from other categories, had the possibility to choose between 10 and 15 years and between 15 and 20 years. In order to be consistent with the other categories, the two figures are summed here in the category between 10 and 20 years.

5.6.4 Importance of authors' remuneration

The graph below shows the breakdown, by category of author and by country, of the percentage of respondents whose primary activity is their only or main source of income. For almost all countries in our sample, the percentage of journalists, translators and visual artists who make a living out of their primary activity is above 70 per cent. This indicates that for the majority of respondents to our survey, the income arising from their primary activity is their main source of income.

The situation is considerably different for authors of books; in all countries, less than 51 per cent view their primary activity as their only or main source of income. This observation is particularly significant for the UK, as the number of responses for authors of books is above 300.

Figure 5.6: Breakdown by country and category of authors of the percentage of respondents who make their living out of their primary activity



Source: Surveys of visual artists, translators, journalists and authors of books.

Note: For authors of books this graph is based on 28 responses for Denmark, 37 for France, 6 from Germany, 13 from Hungary, 10 from Ireland, 3 from Italy, 55 from Netherlands, 5 from Poland, 13 from Spain and 315 from the UK. For journalists this graph is based on 105 responses for Denmark, 24 for France, 113 from Germany, 17 from Hungary, 1 from Ireland, 1 from Italy, 9 from Netherlands, 4 from Poland, 12 from Spain and 50 from the UK. For translators this graph is based on 30 responses for Denmark, 92 for France, 40 from Germany, 1 from Hungary, 4 from Ireland, 2 from Italy, 31 from Netherlands, 38 from Poland, 66 from Spain and 18 from the UK. For visual artists this graph is based on 110 responses for Denmark, 81 for France, 602 from Germany, 1 from Hungary, 22 from Ireland, 47 from Italy, 80 from Netherlands, 16 from Poland, 19 from Spain and 145 from the UK.

5.6.5 Book authors

For authors of books, only the UK had more than ten responses on total earnings from the latest book and as such no meaningful graphical representation can be included. The average total income for authors of books in the UK is at around €8,000 and is based on 33 responses.

There were more respondents providing answers that allowed us to construct an average "total income from advance, additional and CRMOS' payments" variable (four countries had more than ten responses) compared to those providing answers to the "total earnings" question (only the UK had sufficient responses). In order to obtain the average, the figures provided by respondents on advance payments, additional payments and income from CRMOS are added together and are then averaged by country. This new variable is not comparable with the

variable expressing total earnings from the last published books, as they refer to different sources of income.

From the countries with a sufficient number of responses, the highest income occurs in the Netherlands (around €24,000) and is lowest in Denmark (€10,000). Average total annual income derived from the survey follows expectations for the Netherlands, the UK and France; in fact, the former shows the highest average level, whereas UK and France follow with lower average annual incomes. The average level of income for the UK is particularly significant, since it is computed on almost 250 observations. The average income for authors of books from Denmark is the lowest one, according to survey data; on the other hand, we would expect this figure to be the highest. This difference may be due to lack of data, as the average for Denmark is computed on 22 observations only.

Figure 5.7: Average annual income from advance, additional and CRMOs' payments by country



Source: Surveys of authors of books.

Note: The averages displayed in this graph are based on 22 responses from Denmark, 27 from France, 45 from the Netherlands and 249 from the UK.

Note: The graph is based on 447 responses from Germany, 329 from the UK, 129 from the Netherlands, 125 from France, 101 from Denmark, 48 from Spain, 32 from Poland, 19 from Ireland, 17 from Italy and 11 from Hungary.

5.6.6 Journalists

The graph below shows the average total annual income for journalists for countries with at least 10 responses. Due to the lack of observations, only Denmark, Germany and the UK have a sufficient number of responses to be represented in the graph. The data gathered through our survey is consistent with expectations derived from sector average income: Germany and Denmark show the highest average incomes, which are higher compared to the average income for journalists from the UK. On the other hand, average income for journalists from Denmark is consistently higher (around €40,000) compared the figure for Germany (around €32,000), whereas we would expect similar average incomes for the two countries.

This indicates that respondents from Germany could represent the lower end of German journalists' distribution (in terms of income). The same holds for the average income of UK respondents which is considerably lower than the corresponding sector level income.

Figure 5.8: Average total income for journalists by country



Source: Surveys of journalists.

Note: The graph is based on 27 responses for Denmark, 66 for Germany and 33 for the UK.

To conclude, most of the countries in our sample are not well represented by our survey respondents and even for those that have a considerable number of responses it appears that they represent the lower end of the income spectrum.

5.6.7 Translators

The graph below shows the average total annual income for translators for countries with at least 10 responses. Compared to the previous category of journalists, observations for translators are better-dispersed among countries; this allows us to represent all countries, apart from Hungary, Italy and Ireland.

Nevertheless, the number of observations on income for each country is low when compared to other categories of authors; this affects the confidence level placed upon the obtained average figures. The highest observed average income is for translators from Poland; this is opposite to our expectations based on information on the sector, as we would actually expect the figure for Poland to be the lowest compared to the other countries (this could suggest that Polish translators responding to the survey belong to the top range of the income spectrum suggested by sector level income).

Consistently with expectations on the sector, Germany, Denmark and France have higher average incomes compared to Spain, UK and Netherlands. However, the responses from Dutch, Danish and German respondents appear to belong to the lower end of the sector income distribution.

Figure 5.9: Average total income for translators by country

Source: Survey of translators.

Note: This graph is based on 15 responses from Denmark, 51 from France, 22 for Germany, 23 for Netherlands, 22 for Poland, 19 for Spain and 14 for UK.

Translators' responses offer a wider variation across countries compared to journalists but each country is represented by no more than 25 responses, with the exception of France. Moreover, while three Member States appear to correspond to the typical income profile suggested by sector level income (Spain, the UK and France), one country has an inconsistently high observed average income (Poland) and three countries have inconsistently low income levels (Denmark, Germany and the Netherlands).

A caveat to this discussion is that the average income figures presented for survey respondents relate to both literary and audio-visual translators. While we recognise the differences in the prevailing dynamics between sectors, data limitations necessitated this merged form of presentation.

5.6.8 Visual artists

The graph below shows the average of total annual income for visual artists across countries. Averages are included in the graphs only if there are more than 10 responses for the considered category and country; this is an attempt to maintain the representativeness of the average figures presented. Moreover, for each category of author, we present the average income derived from data gathered by Wageindicator⁴⁹³ through voluntary surveys.⁴⁹⁴ This average income is obtained through voluntary surveys carried out in 82 countries; figures are adjusted for inflation, outliers are removed from the sample to guarantee representativeness of the sample and data are updated every year. Consistently with data gathered through our survey, this reported average income is computed on gross earnings. Each average figure is adjusted for the Purchase Power Parity, taking into account differences in national currencies;

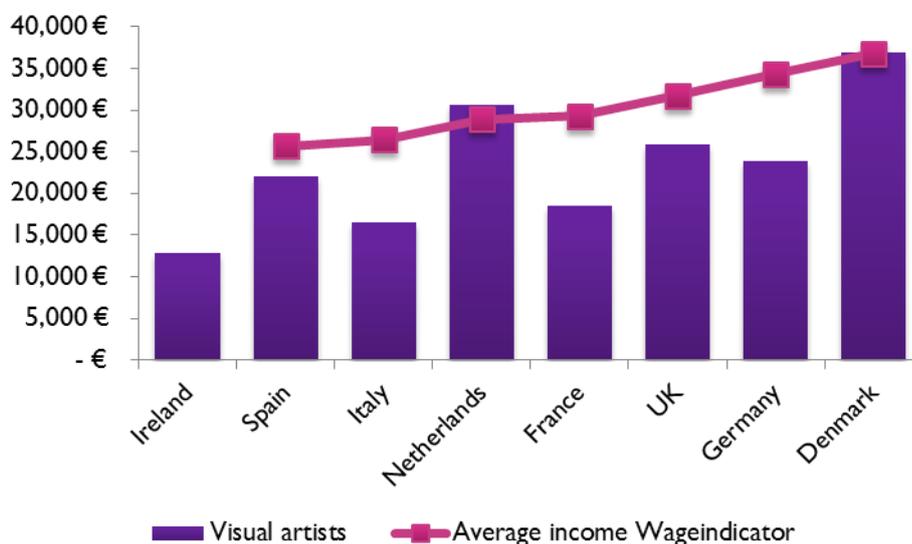
⁴⁹³ Source: <http://www.wageindicator.org/main/salary/Salarycheckers>.

⁴⁹⁴ We considered two possible ways to proxy for the expected average annual income of the considered categories of authors: as a first proxy we considered data gathered by Wageindicator and as a second one we considered average wages for the publishing and broadcasting sector derived from Eurostat. We opted for the former one as it represents more accurately the average incomes for each category. This is because Eurostat figures are only available for the entire publishing sector and for the broadcasting one. Moreover, the study's focus is on freelance authors and therefore wages may not be an ideal proxy for average income. It was not possible to gather data for Ireland neither through Eurostat nor through Wageindicator.

the average for visual artists is computed taking into account data from illustrators, photographers and designers, which are available on the webpage. We decide to opt for this indicator, as it is based on a voluntary survey, such as our survey; even if this instrument of gathering data may not guarantee with certainty the representativeness of the sample (how the sample of respondents resembles the entire population), it is detailed and versatile. Moreover, contingent survey problems, such as the misrepresentation of a certain category of authors (maybe because a wage bracket does not access the internet) should apply for both Wageindicator’s survey and our survey; this validates our choice for this source. This parallel presentation of income levels enables an examination of whether the observed levels of average income of survey respondents are consistent with aggregate country levels of income in their sectors.

A cross-country comparison shows that a considerable part of the data derived from our survey is consistent with expectations driven by income levels in the visual artists’ sector. Denmark shows the highest average income (consistently with expectations on the sector’s data). A trend emerges from the graph: average income for visual artists from Germany is higher compared to averages for France, Italy and Ireland; again, this is consistent to what we expected from the information we gathered of the visual artists’ sector. On the other hand, visual artists from the Netherlands and UK show the second and third highest average incomes; this is not in line with expectations based on sector information, as these figures are above average incomes for France and Germany. Moreover, both the averages (for the Netherlands and UK) are particularly significant, as they are based on a meaningful number of observations (111 for the UK and 66 from the Netherlands). Furthermore, it must be noted that the averages for Italy, Spain and Ireland are less significant compared to the other countries, as they are all based on less than 20 observations (compared, for instance, with Germany which has more than 400 observations).

Figure 5.10: Average total income for visual artists by country



Source: Surveys of visual artists.

Note: This graph is based on 49 responses from Denmark, 56 from France, 435 from Germany, 17 from Ireland, 18 from Italy, 66 from the Netherlands, 14 from Spain, and 111 from the UK. No average income data available for Ireland in Eurostat database.

The above analysis suggests that while our sample may be representative, in relative terms, for some countries, respondents from all countries (except Denmark and the Netherlands) appear to be earning less, in absolute terms, than would be expected by sector level income. This would imply that respondents in these countries reflect the bottom end of the sector.

Moreover, even in relative terms, respondents from Spain and the UK appear to be earning more, in average, than respondents from some other countries with higher sector level income (e.g. Spain compared to Italy and the UK compared to Germany).

5.7 Conclusions

The main data collected for the purposes of this study was obtained from the authors' survey in conjunction with the legal survey. Responses to our survey were heavily geared towards the visual artist category (partly justified by the fact that it is comprised of three sub-categories) and responses were far more scarce for translators, journalists and book authors (with the exception of the UK).

Some of the issues described with the survey data (in 5.4.2) were addressed through our data manipulation process. The main remaining issue is that of representativeness which has resulted in some countries having very few (if any) complete observations for some categories of authors (Hungary, Ireland and Italy in particular). This caveat must be kept in mind when examining the econometric outputs of the following chapter as the results will be, inevitably, more relevant for countries with a high share of total responses (Germany in particular and the UK for book authors). Moreover, the survey responses appear to be reflecting the situation for rather experienced authors (see 5.6.2); however, we have no prior expectations regarding the population-wide breakdown between experienced and less experienced authors.

Our concerns with the data are not extensive enough to prevent us from presenting detailed results in the main body of this report. However, the extent to which one can rely on the results of analysis based on this survey is limited by the very low number of responses in some Member States and the fact that the survey sample does not ensure representativeness.

6 Statistical Analysis

The purpose of this section is to explore the influence of different legal frameworks on the remuneration of all author categories. First, descriptive statistics are used to capture the variation of income levels across countries with different legal frameworks. This is followed by a description of the various issues encountered by authors during their contract negotiations and how these might be associated to different legal frameworks. Lastly, we present our econometric models capturing income variation and the potential that other variables have to account for such variation.

6.1 Descriptive statistics

The sub-sections below illustrate variations of income across countries for different levels of the legal and collective bargaining indicators. Results are presented by first focusing on the aggregate indicator level and then examining constituents of the indicators that were recognised as the most important ones in our legal review.

6.1.1 Legal framework

This section presents the variation in total income averages when considering particular aspects of the different Member States' legal frameworks. It is difficult to draw robust conclusions based on an analysis accounting for only two variables of interest. When only accounting for the impact of the legal framework on income one might be omitting the influence exerted by other variables (such as e.g. the financial strength of the sector in one country). In addition, the lack of uniformity across authors' categories limits considerably the extent to which accurate assertions can be made.

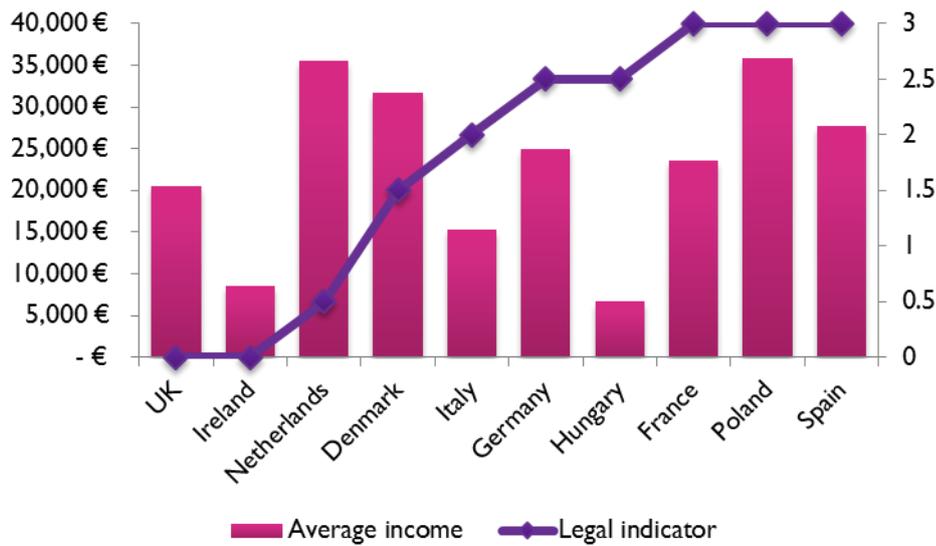
Thus we also employ econometric modelling, presented in the following chapter, allowing us to take into account the influence exerted by other relevant variables. Nevertheless, the sets of graphs presented below may be helpful to detect some clearly visible trends that concern our sample of respondents.

The analysis of cross-country income variations by levels of the aggregate legal indicator is explored first followed by an analysis of cross-country income variations by the most important constituents of the legal indicator (as identified in our legal review).

The graph below, representing average income variation for different levels of the legal indicator, does not allow us to detect any consistent patterns. However, it is worth mentioning some relevant results:

- Poland has the highest average income and it also has the second highest legal indicator score; however, we do not heavily rely on this result, as the average is based on 34 observations.
- The two results based on the highest number of observations are the ones for Germany and the UK, both having more than 400 responses. Average annual income for Germany is higher compared to the average income for the UK; Germany has a relatively high score for the legal indicator (i.e. 2 out of 3), whereas the UK has the lowest score (0.5). This result might suggest that a more protective legal framework may have a positive effect for the authors' average income.

Figure 6.1: Average income by country and aggregate score of the legal indicator

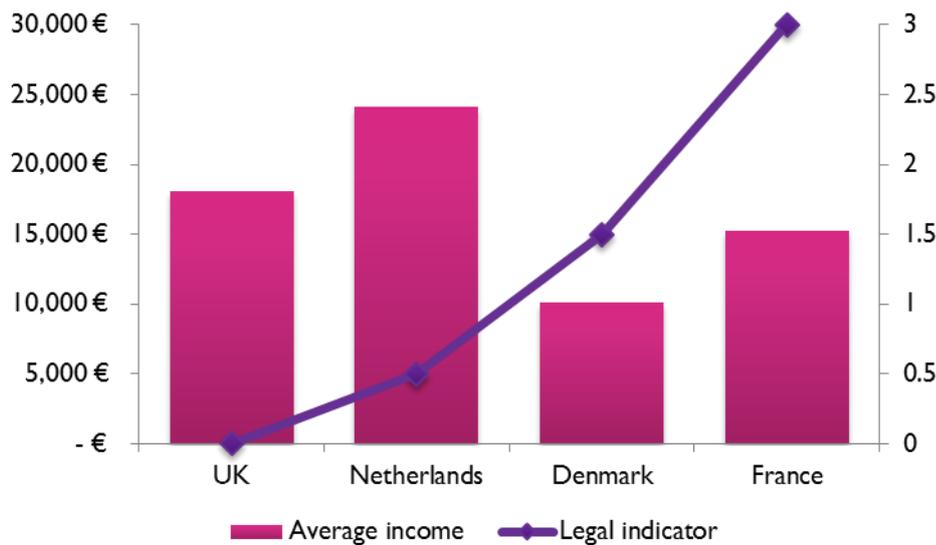


Source: Surveys of visual artists, translators, journalists and authors of books.

Note: This graph is based on 114 responses for Denmark, 146 for France, 532 for Germany, 10 for Hungary, 29 from Ireland, 22 for Italy, 145 for the Netherlands, 34 for Poland, 56 for Spain and 408 for the UK.

The following graph represents the average income variation for different levels of the legal indicator for book authors. These univariate results are rather mixed as it can be observed that the greater protection offered by the legal framework in the Netherlands results in greater income for book authors, relative to the UK. Nevertheless, this is not the case in France as despite being characterised by a greater legal indicator score, French book authors enjoy a lower average income relative to their UK and Dutch counterparts, yet not relative to Danish book authors whose legal protection is deemed lower.

Figure 6.2: Average income of book authors by country and aggregate score of legal indicator



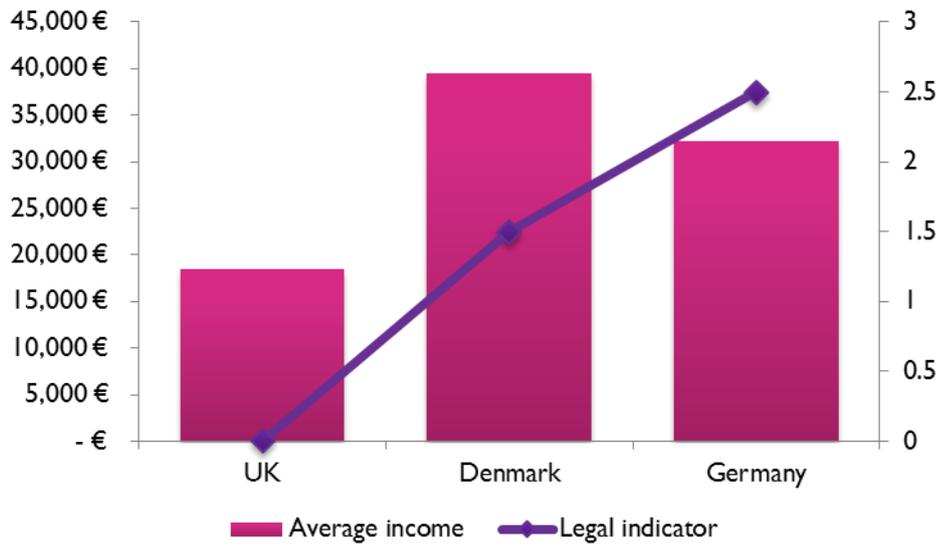
Source: Surveys of visual artists, translators, journalists and authors of books.

Note: This graph is based on 22 responses for Denmark, 27 for France, 5 for Germany, 8 for Hungary, 8 from Ireland, 3 for Italy, 45 for the Netherlands, 2 for Poland, 7 for Spain and 249 for the UK.

The following graph represents the average income variation for different levels of the legal indicator for journalists. Once again, these univariate results are rather mixed as It can be

observed that the greater protection offered by the legal framework in Germany results in greater income for journalists, relative to the UK, yet not relative to Denmark.

Figure 6.3: Average income of journalists by country and aggregate score of legal indicator

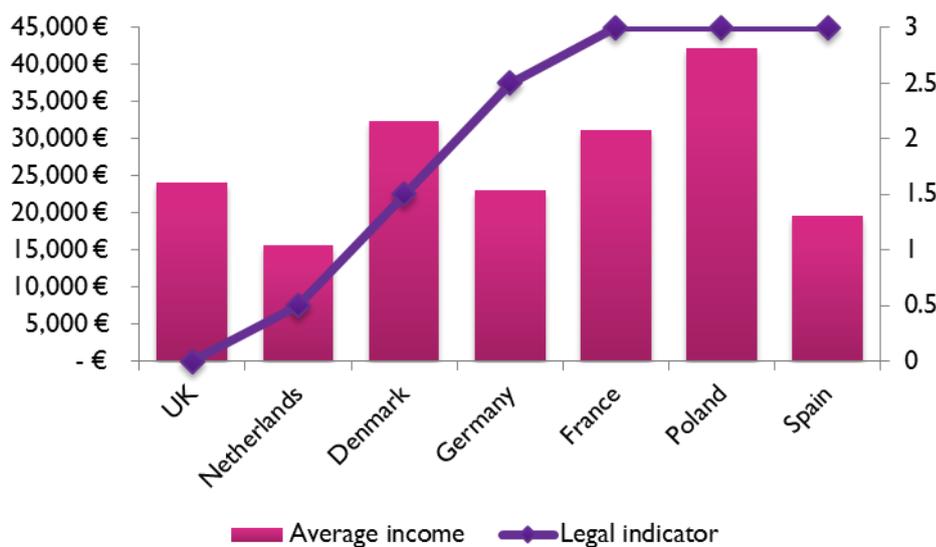


Source: Surveys of visual artists, translators, journalists and authors of books.

Note: This graph is based on 26 responses for Denmark, 3 for France, 66 for Germany, 0 for Hungary, 0 from Ireland, 0 for Italy, 8 for the Netherlands, 3 for Poland, 3 for Spain and 33 for the UK.

The following graph represents the average income variation for different levels of the legal indicator for translators. These univariate results support, to some extent, our hypothesis on the positive effect induced by the protection offered by the inherent legal frameworks on remuneration. More specifically, with the exception of Denmark and Spain, translators enjoy a greater average income in countries where the legal frameworks are more protective.

Figure 6.4: Average income of translators by country and aggregate score of legal indicator

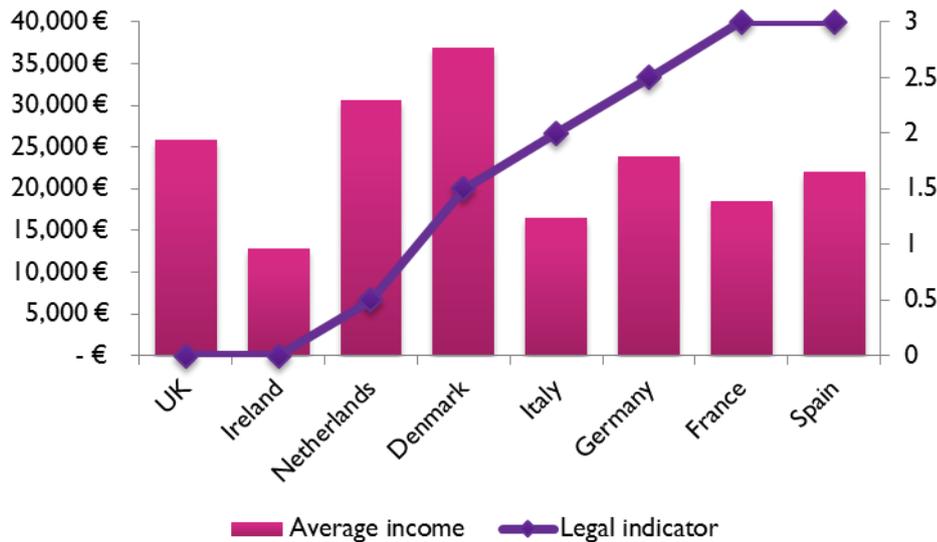


Source: Surveys of visual artists, translators, journalists and authors of books.

Note: This graph is based on 17 responses for Denmark, 60 for France, 26 for Germany, 1 for Hungary, 4 from Ireland, 1 for Italy, 26 for the Netherlands, 25 for Poland, 32 for Spain and 15 for the UK.

The following graph represents the average income variation for different levels of the legal indicator for visual artists. These univariate results are rather mixed as visual artists residing in countries with a greater legal indicator score enjoy a greater average income solely relative to Ireland, whereas relative to the Netherlands, Denmark and the UK the difference appears to be negative, yet in some cases marginal.

Figure 6.5: Average income of visual artists by country and aggregate score of legal indicator



Source: Surveys of visual artists, translators, journalists and authors of books.

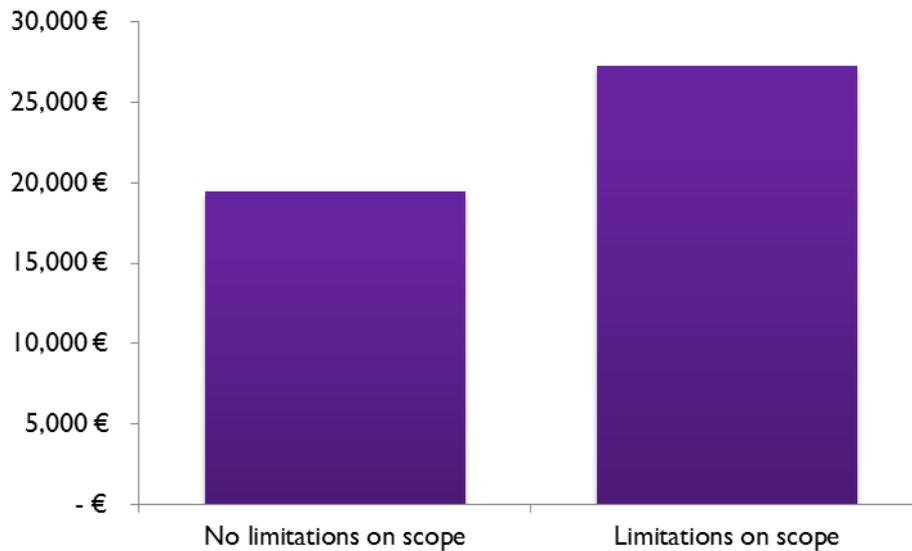
Note: This graph is based on 49 responses for Denmark, 56 for France, 435 for Germany, 1 for Hungary, 17 from Ireland, 18 for Italy, 26 for the Netherlands, 25 for Poland, 32 for Spain and 15 for the UK.

Below we explore the constituents of the legal indicator that were identified in our legal review as the most important influences for authors' remuneration.

Limitations on scope

The first component of the legal indicator which we analyse is the one concerning any limitations on scope. The graph below shows the comparison between the average income of authors who belong to countries with limitations on scope and the average income of authors whose countries do not impose limitations on scope. This pooled analysis highlights the average incomes for authors whose countries impose limitations on scope are higher compared to countries where no limitations on scope are imposed.

Figure 6.6: Average income of authors whose country has limitations on scope against average income of authors whose country does not have limitations on scope

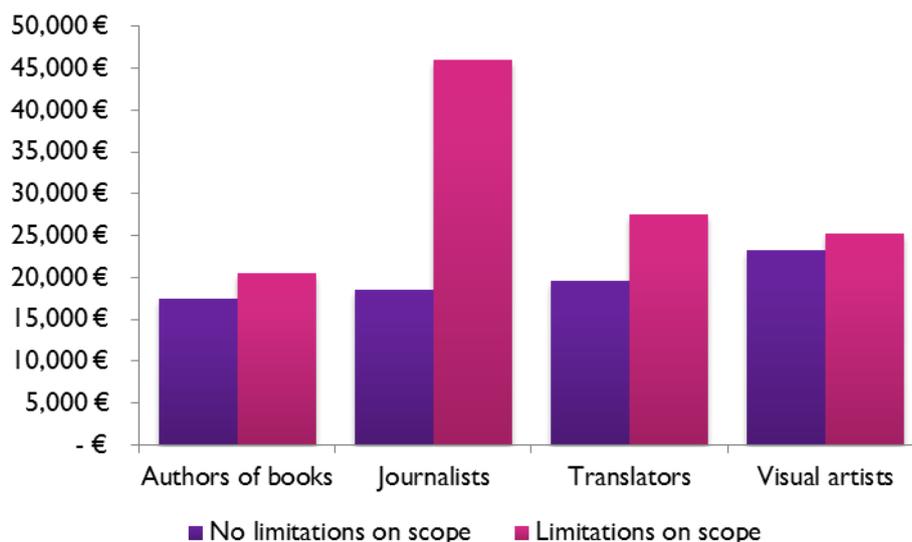


Source: Surveys of visual artists, translators, journalists and authors of books.

Note: The single component of the legal indicator "Limitations on scope" can take the values 0, 0.5 and 1. In this graph we use a variable which takes the value one if the outcome of the single component is greater or equal to 0.5 and 0 otherwise. This graph is based on 1037 responses for countries with limitations on scope and 459 without.

As in the previous analysis, the breakdown of average income by any limitations on scope conditions is also presented below. Consistently with the previous representation, and in line with what we expect, this graph also seems to suggest that the presence of limitations on scope is associated with higher average income for all the considered categories of authors.

Figure 6.7: Average incomes of authors whose country has limitations on scope against average income of authors whose country does not have limitations on scope, by category of author



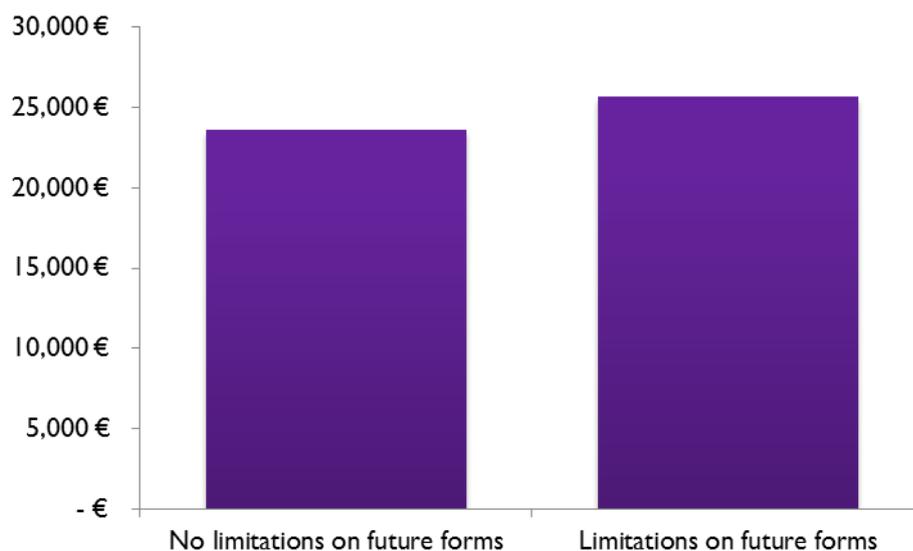
Source: Surveys of visual artists, translators, journalists and authors of books.

Note: For authors of books this graph is based on 116 responses for countries with limitations on scope and 260 for countries without. For journalists this graph is based on 109 responses for countries with limitations on scope and 33 for countries without. For translators this graph is based on 187 responses for countries with limitations on scope and 20 for countries without. For visual artists this graph is based on 625 responses for countries with limitations on scope and 146 for countries without.

Limitations on future forms

The second component of the legal indicator which we analyse separately is the one concerning any limitations on future forms. The graph below shows the comparison between the average income of authors who belong to countries with limitations on future forms and the average income of authors whose countries do not impose limitations on future forms. It emerges from the graph that average income for countries with limitations on future forms is slightly higher compared to the one for countries with no limitations on future forms.

Figure 6.8: Average income of authors whose country has limitations on future forms against average income of authors whose country does not have limitations on future forms

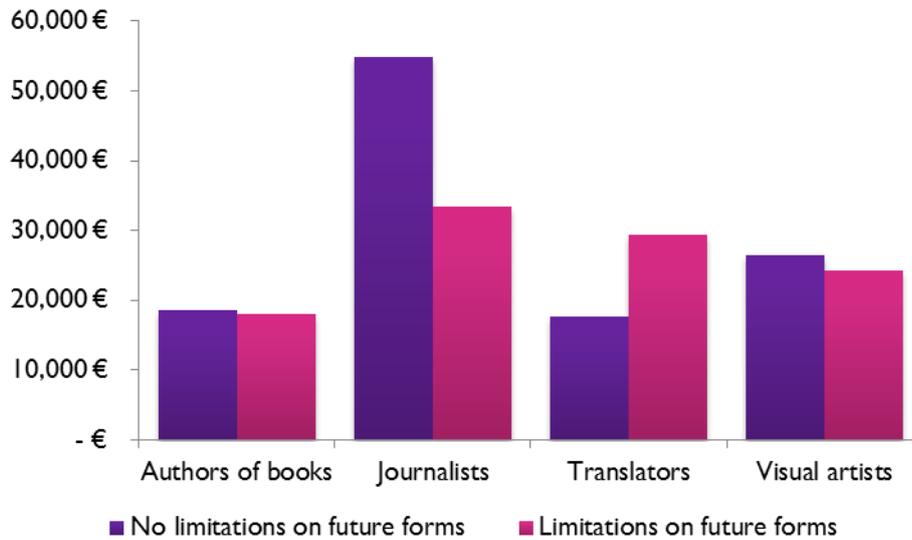


Source: Surveys of visual artists, translators, journalists and authors of books.

Note: The single component of the legal indicator "Limitations on future forms" can take the values 0, 0.5 and 1. In this graph we use a variable which takes the value one if the outcome of the single component is greater or equal to 0.5 and 0 otherwise. This graph is based on 914 responses for countries with limitations on future forms and 582 without.

As in the previous analysis, the breakdown of average income by any limitations on future forms is also presented below. The only two categories for which average incomes differ are journalists (who have higher average income when there are no limitations) and translators (who have a higher average income when there are limitations). Both for authors of books and for visual artists, average income for both scenarios is similar.

Figure 6.9: Average incomes of authors whose country has limitations on future forms against average income of authors whose country does not have limitations on future forms, by category of author



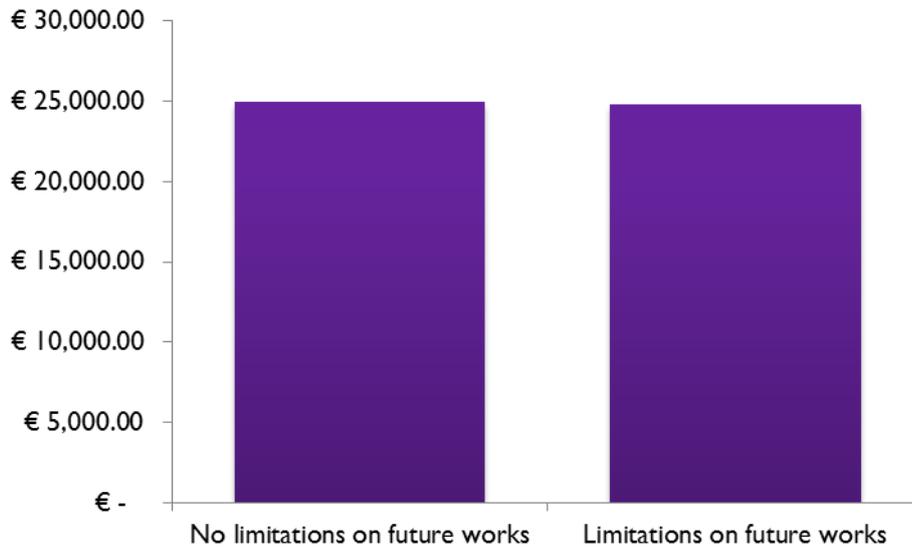
Source: Surveys of visual artists, translators, journalists and authors of books.

Note: For authors of books this graph is based on 74 responses for countries with limitations on future forms and 302 for countries without. For journalists this graph is based on 101 responses for countries with limitations on future forms and 41 for countries without. For translators this graph is based on 162 responses for countries with limitations on future forms and 45 for countries without. For visual artists this graph is based on 577 responses for countries with limitations on future forms and 194 for countries without.

Limitations on future works

The graph below shows the comparison between the average income of authors who belong to countries with limitations on future works and the average income of authors whose countries do not impose limitations on future works. It emerges from the graph that average income for the two categories is almost the same.

Figure 6.10: Average income of authors whose country has limitations on future works against average income of authors whose country does not have limitations on future works

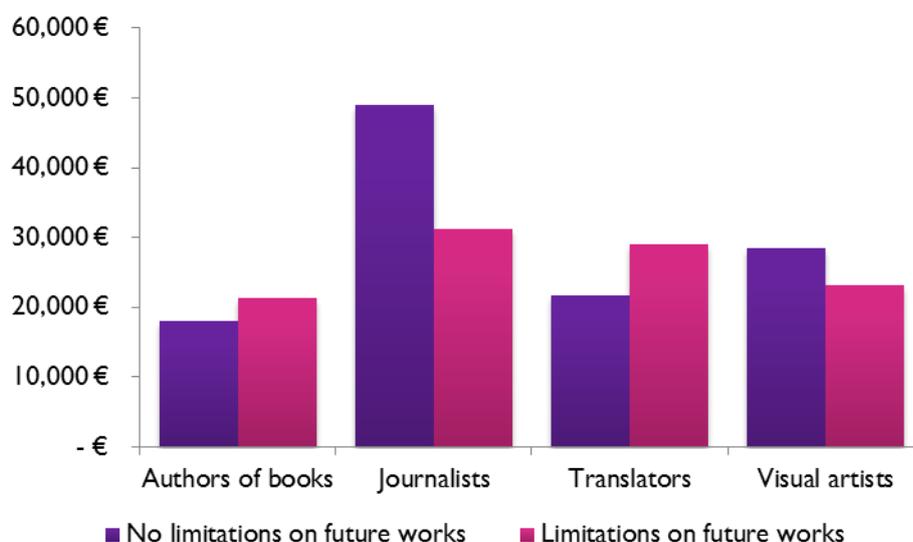


Source: Surveys of visual artists, translators, journalists and authors of books.

Note: The single component of the legal indicator "Limitations on future works" can take the values 0, 0.5 and 1. In this graph we use a variable which takes the value one if the outcome of the single component is greater or equal to 0.5 and 0 otherwise. This graph is based on 800 responses for countries with limitations on future works and 696 without.

The graph below presents the same breakdown for the different author categories. Results are mixed and they do not allow us to draw a uniform conclusion on the possible effect of limitations on future works. For authors of books and translators, the data seems to suggest that the presence of limitations on future works has a positive effect on average income. On the other hand, both for journalists and visual artists the effect seems to be in the opposite direction.

Figure 6.11: Average incomes of authors whose country has limitations on future works against average income of authors whose country does not have limitations on future works, by category of author



Source: Surveys of visual artists, translators, journalists and authors of books.

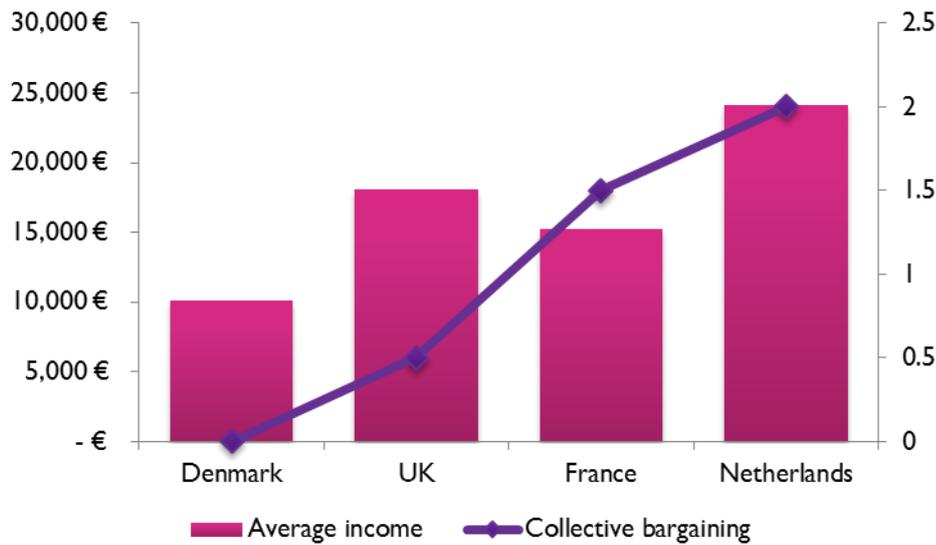
Note: For authors of books this graph is based on 52 responses for countries with limitations on future works and 324 for countries without. For journalists this graph is based on 75 responses for countries with limitations on future works and 67 for countries without. For translators this graph is based on 145 responses for countries with limitations on future works and 62 for countries without. For visual artists this graph is based on 528 responses for countries with limitations on future works and 243 for countries without.

6.1.2 Collective bargaining indicator

The legal indicator described in the previous section was different across countries but did not change for different categories of authors. This is not the case for the collective bargaining indicator which changes both across countries and across categories. In particular, authors of books and visual artists have the same indicator values, journalists have a different set of values and translators also have a different set of values. Below, we first explore cross-country average income variation for different levels of the collective bargaining indicator and then we analyse cross-country average income variation for the indicator's most important constituents (as identified in the legal review). The aggregate collective bargaining indicator is obtained by adding together the scores assigned to the individual constituents of the collective bargaining indicator, as explained in section 5.5.2. This indicator is specific for each category of author, hence each category will be analysed separately.

The first graph shows a country breakdown of average income and the outcome of the collective bargaining indicator for authors of books. Only four countries have more than 10 observations on total income, Denmark, the UK, France and the Netherlands. The graph suggests that the average income for authors of books increases as the collective bargaining indicator increases, with the exception of the UK where authors face a lower level of collective bargaining strength than France, yet earn a higher average income.

Figure 6.12: Breakdown by country of average income and the outcome of the collective bargaining indicator for authors of books



Source: Surveys of authors of books.

Note: This graph is based on 22 responses for Denmark, 249 for the UK, 27 for France and 45 for the Netherlands.

The graph below shows the breakdown by country of average income and the outcome of the collective bargaining indicator for journalists. Only three countries have a sufficient number of observations to be displayed. The graph suggests, as in the case of book authors, that a higher collective bargaining indicator is associated with higher average income.

Figure 6.13: Breakdown by country of average income and the outcome of the collective bargaining indicator for journalists



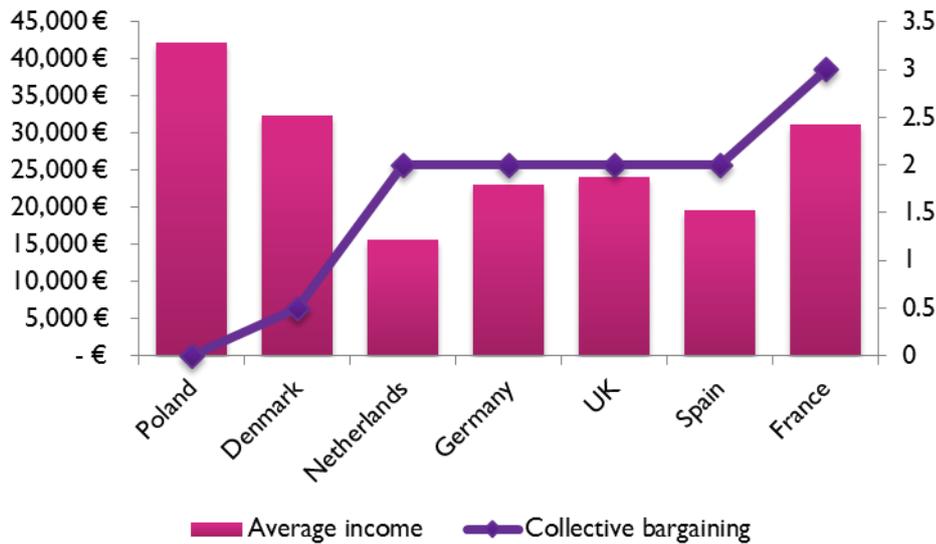
Source: Surveys of journalists.

Note: This graph is based on 33 responses for the UK, 26 for Denmark and 66 for Germany.

The graph below shows the breakdown by country of average income and the outcome of the collective bargaining indicator for translators. In the case of translators, observations are well-dispersed across different countries and this enables us to display seven countries. As opposed to journalists and book authors there is no obvious trend in this graph. In fact, it may suggest that higher collective bargaining may lead to lower average incomes, as average incomes in Poland and Denmark (lowest levels of collective bargaining indicator) are the highest.

However, the implications of this diagram should be interpreted with caution because of the low number of observations for these countries.

Figure 6.14: Breakdown by country of average income and the outcome of the collective bargaining indicator for translators



Source: Surveys of translators.

Note: This graph is based on 25 responses for Poland, 17 for Denmark, 26 for the Netherlands, 26 for Germany, 15 for the UK, 32 for Spain and 60 for France.

The graph below shows the breakdown by country of average income and the outcome of the collective bargaining indicator for visual artists. As with translators, no clear trend can be observed in this graph. Denmark, Italy and the UK, all have very low levels of the indicator but have incomes that are higher than other countries with higher levels; this is particularly so for Denmark which has the highest average income in our sample. Among the rest of the countries, it appears that a higher level of the collective bargaining indicator is associated with higher average income levels for visual artists.

Figure 6.15: Breakdown by country of average income and the outcome of the collective bargaining indicator for visual artists



Source: Surveys of visual artists.

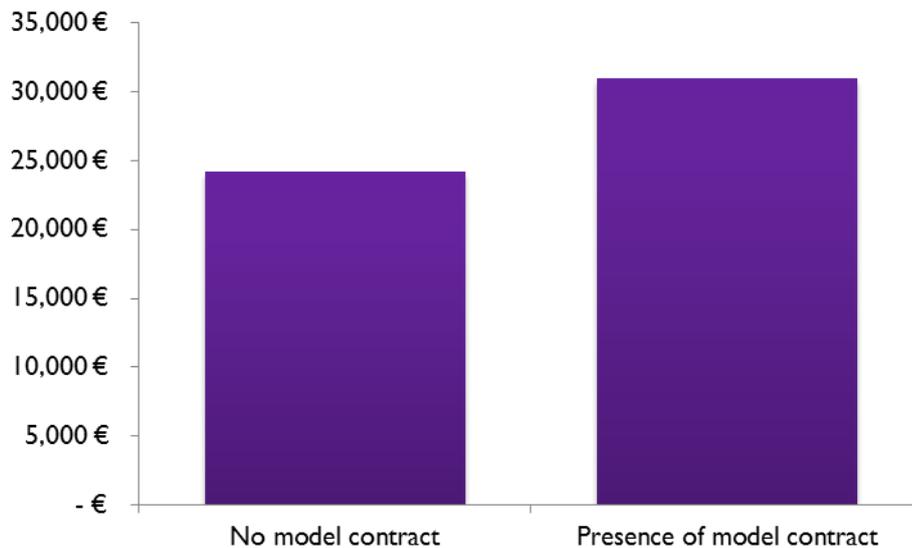
Note: This graph is based on 49 responses for Denmark, 18 for Italy, 111 for the UK, 17 for Ireland, 56 for France, 435 for Germany, 14 for Spain and 66 for the Netherlands.

Model contract

The first component of the collective bargaining indicator to be analysed is the one indicating the presence of a model contract. The “presence of a model contract” captures both cases where some model contracts are available as well as cases where a model contract is available for most sectors.

The graph below shows the average income of countries where there are some model contracts compared to the average income of countries where there are no model contracts (taking into account that the situation is different for each category of author). The average income for countries where there are model contracts in place is higher compared to the other category. This is in line with our expectations derived from the analytical framework.

Figure 6.16: Average income for authors from countries where model contracts are available against average incomes of authors from countries don't have model contracts



Source: Surveys of visual artists, translators, journalists and authors of books.

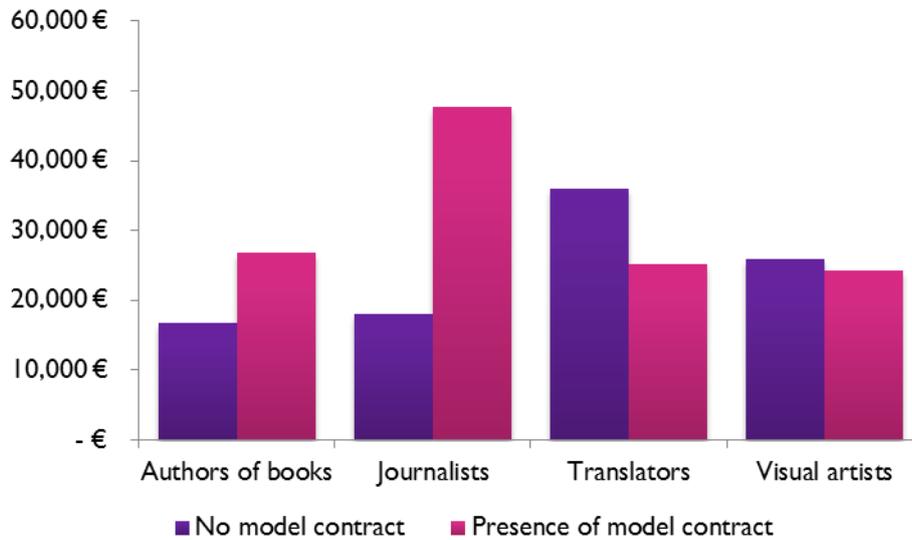
Note: The single component of the collective bargaining indicator "Model contract" can take the values 0, 0.5 and 1. In this graph we use a variable which takes the value one if the outcome of the single component is greater or equal to 0.5 and 0 otherwise. This graph is based on 876 responses for countries with model contracts and 620 without.

The graph below shows the comparison of average income for authors belonging to countries where model contracts are available against average income of authors whose countries don't have model contracts. For authors of books and journalists average income is higher where a model contract is present and this would be in line with the model contracts' role in decreasing information asymmetries. On the other hand, this does not hold for translators as their average income is higher for countries where model contract are not available. For visual artists, average income for countries with no model contracts is slightly higher, but the difference is not particularly significant.

The observed variation in the influence of model contracts can be sourcing from a number of parameters which can include the improper initial design of such contracts and the lack of any enforceability in applying them. The inconsistencies in income levels observed across different countries, however, may not be solely due to the different model contract arrangements. Some countries may have generally lower income levels compared to others, differences in legal frameworks might be of importance (particularly where the strength of the legal framework may be an important determinant for model contracts), model contracts might have considerably different coverage and lastly, the nature model contract arrangements can vary across author categories.

The above reasons may be driving the observed differences in average income levels and they can complicate the analysis of whether the mere existence of model contract arrangements has a significant effect on income levels. As such the interpretation of these results needs to be caveated and further analysis (in the form of econometrics) should be undertaken.

Figure 6.17: Average income for authors from countries where model contracts are available against average incomes of authors from countries don't have model contracts, by category of author



Source: Surveys of visual artists, translators, journalists and authors of books.

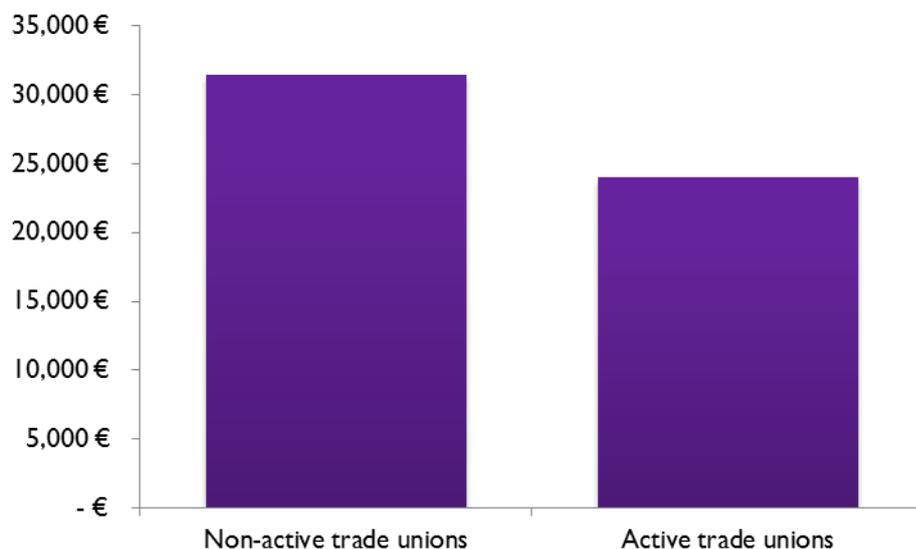
Note: For authors of books this graph is based on 65 responses for countries with model contracts and 311 for countries without. For journalists this graph is based on 103 responses for countries with model contracts and 39 for countries without. For translators this graph is based on 176 responses for countries with model contracts and 31 for countries without. For visual artists this graph is based on 532 responses for countries with model contracts and 239 for countries without.

Role of trade unions

The second component of the collective bargaining indicator is the role of trade unions. The distinction is made between countries with no active trade unions and countries with active trade unions (both those with no tangible result having been achieved and those with some tangible results).

The graph below shows average income for countries where trade unions are active compared to average income for countries where trade unions are not active. From the graph it emerges that the activity of trade unions has a negative effect on the author's income. On the other hand, even if both averages rely on a consistent amount of observations, the average for countries with active trade unions is particularly higher compared to countries with no active trade unions (1,268 observations for countries with active trade unions against 228 observations for the other countries).

Figure 6.18: Average income for authors belonging to countries where trade unions are active against average incomes of authors belonging to countries where trade unions are not active

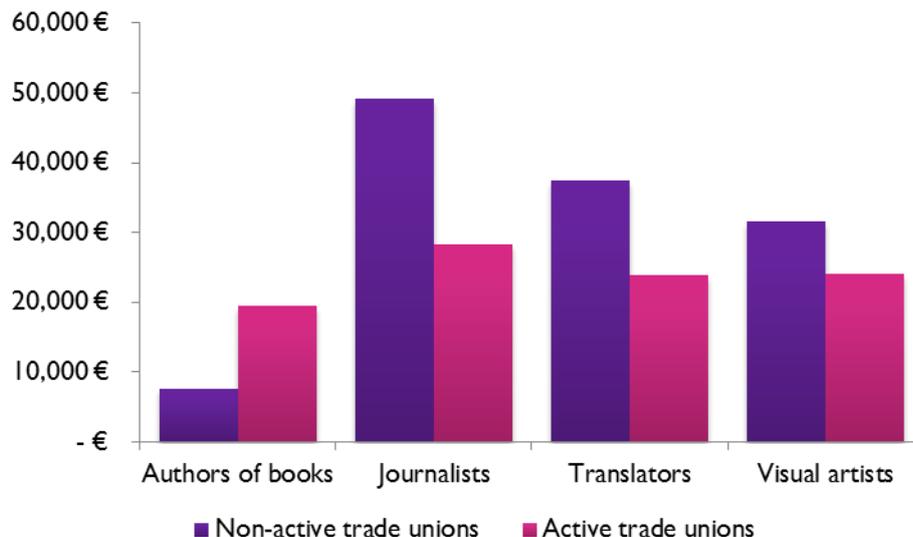


Source: Surveys of visual artists, translators, journalists and authors of books.

Note: The single component of the collective bargaining indicator "Role of trade unions" can take the values 0, 0.5 and 1. In this graph we use a variable which takes the value one if the outcome of the single component is greater or equal to 0.5 and 0 otherwise. This graph is based on 1,268 responses for countries with active trade unions and 228 without.

The graph below shows the comparison of average incomes for authors belonging to countries where trade unions are active against average incomes of authors belonging to countries where trade unions are not active. According to the analytical framework, it is not possible to detect the effect of the role of trade unions on remuneration of authors a priori. Our results suggest that the more active trade unions are, the lower the average income level is for all categories of authors, apart from authors of books. For authors of books, the presence of trade unions appears to be associated with a higher average level of income.

Figure 6.19: Average income for authors belonging to countries where trade unions are active against average incomes of authors belonging to countries where trade unions are not active, by category of author



Source: Surveys of visual artists, translators, journalists and authors of books.

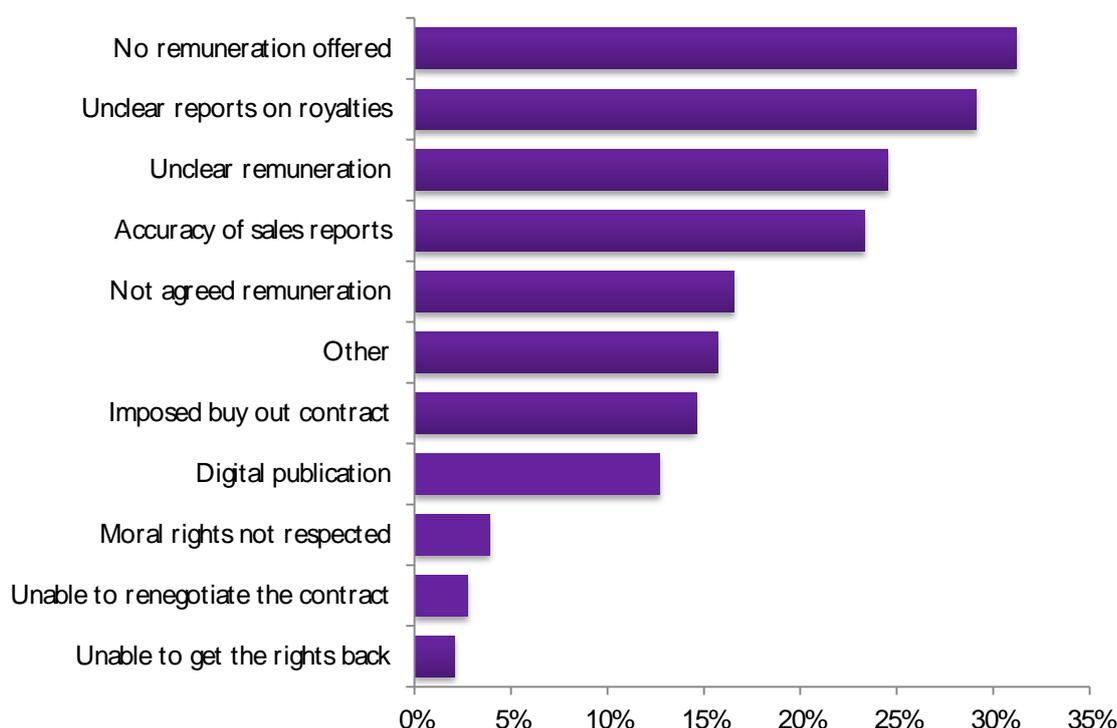
Note: For authors of books this graph is based on 341 responses for countries with active trade unions and 35 for countries with non-active trade unions. For journalists this graph is based on 65 responses for countries with active trade unions and 77 for countries with non-active trade unions. For translators this graph is based on 163 responses for countries with active trade unions and 44 for countries with non-active trade unions. For visual artists this graph is based on 699 responses for countries with active trade unions and 72 for countries with non-active trade unions.

6.2 Problems faced by authors

Respondents were asked to report whether they faced any issues with their latest book (for book authors) or with respect to their freelance contract (for all other categories). From the pooled sample it emerges that the most frequent problem is that no remuneration was offered with the contract; indeed, as it is shown in Figure 6.20, almost 30 per cent of respondents reported that there was no remuneration included in the contract; other issues related to compensation (such as unclear reports on royalties and inaccurate sales reports) were mentioned by more than 20 per cent of authors, while not receiving the agreed remuneration was a problem only in the 14 per cent of cases.⁴⁹⁵

On the other hand, moral rights do not seem to be a main issue: problems such as moral rights not being respected, the impossibility of renegotiating the contract and being unable to have the rights back are reported in less than 10 per cent of cases, respectively. Moreover, 15 per cent of respondents reported no problems.

⁴⁹⁵ The percentages were obtained dividing the number of times a problem was reported by the number of total respondents, in order to get the proportion of individuals who reported such problem. As respondents were allowed to give multiple responses to this particular question the reader should not expect the frequencies of different responses to sum up to 100 per cent.

Figure 6.20: Frequency of problems encountered by respondents

Source: Survey of visual artists, book authors, journalists and translators.

Note: The complete answers that were included in the survey were: "I could not verify the accuracy of the reporting on the sales of my work", "I did not receive the agreed remuneration", "I had to accept a buy-out contract with a lump-sum in return for the transfer of all rights and in perpetuity", "I received no clear report on the royalties paid", "I tried to get my rights back but there was no legal possibility to terminate the contract or to opt-out", "I wanted to renegotiate the contract but there was no legal possibility", "It was not clear how much remuneration I should receive for my work", "My moral rights were not respected", "My work was published in a digital format without my knowledge and/or authorisation", "None of the above", "Other" and "There was no remuneration offered or included in my contract".

Figure 6.21 illustrates the frequency with which different categories of authors encounter different problems. The pooled results are primarily driven by the high number of visual artists' responses, thus necessitating a further breakdown of responses. An approximate 62 per cent of journalists mentioned "no remuneration"; this is, by a considerable margin, the most frequently encountered problem for any category of author. On the other hand, being unable to get one's rights back or renegotiating a contract, as well as moral rights concerns (including unauthorised digital publication, to some extent) are not main issues for any of the categories.⁴⁹⁶

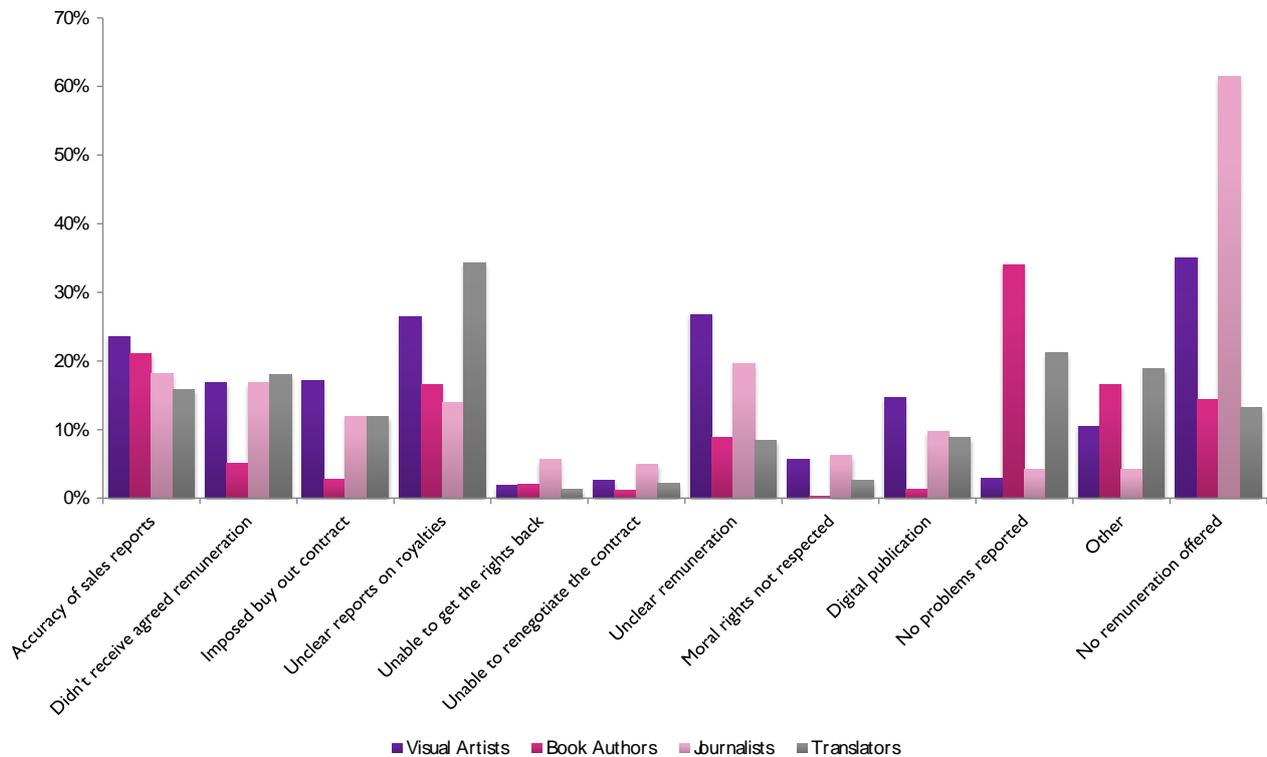
Other salient points reflecting significant differences in responses by author categories include:

- not receiving the agreed remuneration is a problem encountered by around 15 to 20 per cent of all types of authors except from book authors (around 5 per cent);
- unclear reports on royalties are mainly faced by visual artists (around 26 per cent) and translators (around 34 per cent);
- unclear remuneration is mainly an issue for visual artists (around 27 per cent) and journalists (around 20 per cent);
- unauthorised digital publication is a rather infrequent issue for book authors (less than 2 per cent) while it is more frequent for all other categories (around 8 to 15 per cent); and

⁴⁹⁶ This is an interesting point as these issues are not identified by our respondents as the main ones; on the other hand, such issues are often mentioned by representative bodies and organisations as some of the most important ones.

- interestingly, book authors were the ones that had no problems to report in most cases compared to all other categories (34 per cent) followed by translators (21 per cent).

Figure 6.21: Percentage of problems disaggregated by category



Source: Survey of visual artists, book authors, journalists and translators.

The most frequently reported problem was that of “no remuneration”, particularly so for journalists with 62 per cent of journalists who completed the survey reporting this problem. The vast majority of journalists who answered the survey reported Germany and Denmark as their country of origin (and less so the UK). Both Denmark and the UK show low levels for the final outcome of the legal indicator: 0.5 for the UK and 3.0 for Denmark. A low level of protection granted by the legal framework may be one of the main reasons why a consistent share of journalists in these two countries has reported the problem of no remuneration. On the other hand, the final outcome of the legal indicator for Germany is one of the highest, with a score of 5.5; hence, the final outcome of the legal indicator may not be able to explain the reasons why the analysed problem is so frequent.

The presence of formalities for the transfer of rights may prevent authors from committing to misleading contracts which, consequently, may not provide them with their expected levels of remuneration for their work. In fact, both Denmark and Germany impose no formalities for the transfer of rights in their legal systems. This factor could be one of the reasons a disproportionate number of journalists have experienced the “no remuneration problem”.

The problem of “remuneration” is often faced by visual artists and journalists and it could also be reasonably associated to a legal framework establishing “formalities for the transfer of rights”. One would expect that the absence of formalities for the transfer of rights in a country may cause increased issues regarding the remuneration of authors. Both visual artists and journalists are mainly represented by respondents from Germany and Denmark. As explained above, these two countries do not impose any formalities and this could be one of the reasons why a considerable share of journalists and visual artists have faced issues in understanding the amount of remuneration the author has the right to receive.

It is worth observing that book authors reported facing no problems with the highest frequency across the different categories. Moreover, for various other problems (such as “Didn’t receive agreed remuneration”, “Imposed buy out contract”, “Unable to renegotiate the contract” and “Digital publication”) authors of books reported less frequently that they had encountered such problems as opposed to other categories of authors. Since the vast majority of authors of books who completed the survey are from the UK, the low frequency of reported problems could be capturing the situation in the UK rather than the general conditions faced by book authors across the sample countries.

6.3 Econometric modelling of income

6.3.1 Reasons for using econometric analysis

The use of econometrics involves the application of mathematical and statistical methods to economic data, aimed at determining the impact of certain characteristics (independent variables) on an outcome (dependent variable). Specifically, econometrics allow us to infer the effect of a particular characteristic on the variable we wish to explain (remuneration), while simultaneously accounting for the effect of any additional characteristics under consideration.

As highlighted in the previous chapter, exploring the interactions of two variables at a time does not allow us to draw robust conclusions. On the other hand, the econometric analysis carried out in this chapter allows us to account for a number of factors that may be driving the remuneration of authors. Ultimately, this level of analysis will allow us to corroborate the findings of the legal analysis and explore whether they are supported by the collected data.

By simultaneously taking into account all relevant variables, we will be able to investigate whether the presence of various legal provisions has any statistically significant effects on authors’ remuneration. The descriptive statistics presented in section 6.1 identified some differences in the remuneration of countries in our sample based on whether particular legal provisions were present or not. These relationships might be driven by external factors which are investigated by using econometrics. Some of the key observations related to statutory provisions from section 6.1 that require further examination are listed below:

- limitations on the scope of transfer of rights is associated with higher average income for all author categories;
- limitations on future forms are associated with a higher average income level for translators and a lower level for journalists; and
- limitations on future works do not appear to have clear associations.

As far as the constituents of the collective bargaining indicator are concerned the main observations from section 6.1 are the following:

- the existence of model contracts is associated with a higher average income level for authors of books and journalists while for translators the opposite was true; and
- the presence of active trade unions is associated with lower levels of average income for all categories except authors of books.

6.3.2 Approach to econometric analysis

When estimating econometric models there are two broad strategies that can be used: a ‘general to specific’ strategy and a ‘specific to general’ strategy. If the former strategy is adopted the econometrician starts with a model that contains ‘many’ potential explanatory variables and eliminates those that are not significant (either from a statistical or economic perspective) to develop a simpler model. The main objective is to obtain an estimated equation that is capable of ‘explaining’ the dependent variable at least as well as a more complex one

but is preferred due to the fewer included explanatory factors. On the other hand, if the latter strategy is adopted, the econometrician starts with a simple model (usually one with a single explanatory variable) and adds variables until no additional explanatory power is provided.

There are theoretical reasons why it is usually preferable to adopt a 'general to specific' approach to econometric modelling. However, in practice this is not always possible as this strategy implies that the number of included observations remains unchanged. However, if an observation is missing at the beginning of the procedure, potentially due to data unavailability on a specific variable, then that observation would not be used in the models.

Therefore, we adopted a 'mixed' strategy. First, we developed basic models including a limited number of explanatory variables that we would expect a priori to have an effect on remuneration. These consist of the indicators of the strength of the legal framework and collective bargaining agreements across countries. Subsequently, we attempted to add additional explanatory variables such as per household cultural expenditure, market concentration proxies, measures approximating the financial performance of the examined sectors and author-specific characteristics. The latter include the author's experience and whether a third party representative, or an agent, was involved in the negotiation process. Moreover, in order to account for unobserved country-specific factors that could affect remuneration through channels unrelated to the inherent legal and collective bargaining frameworks, country fixed effects were also included.

Ideally, one would like to conduct estimations within longitudinal income data for the examined author categories. This would allow us to capture variations in income over time, while simultaneously accounting for different author types, and establish causal relationships between such variations and changes in the legal or collective bargaining frameworks. Nevertheless, such panel data estimations would require a significant amount of income information across authors and across a substantial period of time. Evidently, such an analysis would be greatly impeded by data collection issues, while non-response issues, as the ones observed in the current study, and potential cross-country dependencies (i.e. correlations in outcome measures between countries) would significantly affect the derived results and conclusions. In light of the above, cross-sectional estimations were deemed as the most suitable method within the context of this study.

In order to assess the overall explanatory power of each estimated model, we used the adjusted R-squared statistic which constitutes an enhanced form of the simple R-squared statistic. The R-squared is a statistical measure, expressed in percentage form, which captures the goodness of fit of a specified model. The goodness of fit describes the discrepancy between the observed values and the predicted values under the model, i.e. how well the model fits the data. Therefore, an R-squared of 100 per cent suggests that the regression line perfectly fits the data.

However, the R-squared increases with the number of variables included in the estimation. This generates a drawback to its use, where one might keep adding variables ("kitchen sink" regression) to increase the R-squared value. This leads to the alternative approach of looking at the adjusted R-squared which imposes a "penalty" as extra variables, which do not offer any additional explanatory power, are included in the model.

In order to determine whether the adjusted R-squared is a reliable indicator of goodness of fit, the F-test was conducted. The use of this statistical test enabled us to assess the probability that all included variables jointly offer no significant explanatory power.⁴⁹⁷ The determination of the contribution of each additional variable to the overall explanatory power of the model

⁴⁹⁷ A probability below 0.10 would strongly suggest that the adjusted R-squared is a reliable indicator.

was achieved using the Akaike Information Criterion and the Schwarz-Bayes Criterion.⁴⁹⁸ As a result, the final models included specifications exhibiting the lowest values of the aforementioned criteria. Moreover, a number of diagnostic tests were employed in order to check whether including additional variables had an impact on the extent to which the estimated model satisfied the assumptions of the chosen regression specification.⁴⁹⁹

6.3.3 Econometric estimation outputs

Our “mixed” estimation strategy was employed in two stages. First, a pooled sample including all available observations across author categories was constructed (visual artists, book authors, translators and journalists). The choice to conduct econometric estimations within a pooled sample was guided by our aim to determine the overall impact on remuneration of the legal and collective bargaining frameworks across countries and professions. More specifically, the substantial amount of observations contained within the pooled sample, enabled us to extract robust conclusions regarding such aggregate effects before examining how these inferences change within each separate author category.

Secondly, we estimated similar model specifications within reduced samples corresponding to each individual author category separately. This process allowed us to examine the remuneration impacts of individual legal and collective bargaining provisions, which were merged together to form the indicators.

6.3.4 Pooled sample regressions

This section presents the econometric model estimates of the main variables of interest for the pooled sample of authors.⁵⁰⁰ These variables of interest are related to the legal framework or collective bargaining arrangements of different countries; they can either be expressed in the form of an aggregate indicator or they can be focused on particular constituents of these indicators (such as the ones identified in the legal review). The statistical significance of each of the estimated coefficients is also reported. Similarly, measures reflecting the overall explanatory power of each model along with the results of the conducted robustness tests are presented.

In Table 6.1 we illustrate the output of our pooled sample regression. The model specification also includes dummy variables corresponding to different author types.⁵⁰¹ Literary translators constitute the base category relative to which the effect of each of the remaining categories is estimated. This allows us to capture the impact of the legal and collective bargaining indicators, while accounting for the different income dynamics across authors. A positive and statistically significant relationship between the degree of protection offered by the legal

⁴⁹⁸ The Akaike Information Criterion and the Schwarz-Bayes Criterion allow non-nested models (i.e. models that may have entirely different sets of explanatory variables) to be compared and provide information on the extent to which each model fits the data.

⁴⁹⁹ The diagnostic tests included testing for multicollinearity (using collin in Stata). This allows us to compute the average Variance Inflation Factor (VIF) for each model, while making sure that each variable’s VIF score is below 10. We also account for correct model specification (using ovtest in Stata). This allows us to compute the Prob (F-stat) for the Ramsey RESET test. A value above 0.10 would suggest that the model is not exposed to specification errors. Lastly, to account for heteroscedasticity, all models were estimated using White heteroscedasticity-consistent standard errors and covariance (using robust in Stata).

⁵⁰⁰ Detailed descriptions of each of the estimated models, along with the coefficient estimates of all included explanatory variables in each model, are reported in 12.5.1.

⁵⁰¹ ‘Dummy variables’ take a value of either zero or one. For example, a dummy variable indicating whether or not the individual is a book author would take a value of one for all respondents that are book authors and zero for all other respondents.

framework and remuneration can be observed.⁵⁰² This suggests that, while accounting for the effect of the remaining included variables in the model, the income of respondents residing in countries with a higher level of legal protection, i.e. a higher legal indicator score, is greater than that of respondents residing in countries exhibiting a lower level of legal protection.

On the other hand, the collective bargaining framework appears to exert an insignificant effect. This suggests that, while accounting for the remaining variables in the model, income differences between respondents residing in countries with increased collective bargaining and respondents residing in countries with less collective bargaining, as measured by our collective bargaining indicator, are statistically indistinguishable from zero.

Regarding the effects of the examined author categories, audio-visual translators in our sample earn a significantly higher income, on average, relative to literary translators in our sample, while book authors in our sample earn a significantly lower income, on average, compared to literary translators in our sample. The relative underperformance of book authors can be attributed to the relevant remuneration variable which exhibits a considerably lower average value due to its measurement as total earnings from only the latest publication. Nevertheless, the observed results are robust to the exclusion of book authors as removing the relevant observations from the pooled sample does not alter the signs and statistical significance of the remaining included variables.

As for the remaining author categories, visual artists, audio-visual journalists and print journalists in our sample do not exhibit statistically significant average income differences compared to literary translators in our sample when accounting for a number of control variables.

Table 6.1: Pooled regression estimates (P1)

| Variable | Coefficient |
|--|--------------------|
| Legal framework | |
| Legal indicator | 0.204** |
| Collective bargaining indicator | -0.003 |
| Author category | |
| Visual artist | 0.125 |
| Book authors | -3.951*** |
| AV translators | 0.547** |
| AV journalists | 0.274 |
| Print journalists | 0.114 |

Note: Conventionally, p-values smaller than 0.10 (10 per cent) are taken as evidence that a regression coefficient is statistically different than zero. Specifically, p-values below 1 per cent indicate strong statistical significance, whereas p-values close to 10 per cent indicate relatively weaker statistical significance. In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 13.9 per cent; AIC: 4.22; BIC: 4.28; mean VIF: 2.97; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.529.

The insignificant effect of the collective bargaining indicator and the simultaneous significant effect of the legal indicator are suggestive of the likely function of collective bargaining as a proxy for the implied legal frameworks across countries. Specifically, when estimating a model including only collective bargaining as an independent variable, its effect is positive and significant. Nevertheless, when the legal indicator is included to the same model specification,

⁵⁰² Our results are robust to alternative legal indicator specifications involving the additional inclusion in its calculation of the legal provisions which were concluded from the legal analysis not to have a significant effect on authors' remuneration. Within a similar context, estimations in which the legal indicator was composed solely of the legal provisions deemed less important from our legal review resulted in insignificant effects.

the effect of collective bargaining is rendered insignificant while the effect of the legal indicator is positive and highly significant.⁵⁰³

As the legal provisions across Member States cover a wide array of practices it is not always feasible to establish direct associations between a country's legal and collective bargaining framework. One point of view, supported by our correlation analysis (presented in 12.5.1) is that more protective legal frameworks (i.e. higher value of the legal indicator) appear to have an emphasis on collective bargaining arrangements (as reflected by the collective bargaining indicator).

In order to further investigate the impact of collective bargaining on remuneration, we examined whether the individual constituent provisions of the indicator impose a significant effect. Specifically, in Table 6.2, the effects of the existence of model contracts and of the role of trade unions are illustrated. Consistent with the aggregate indicator effect, reported in Table 6.1, both provisions do not exert a significant influence. Nevertheless, the positive and significant effect of the degree of protection offered by the legal framework persists. Similarly, the effects of the different author categories on remuneration remain unchanged.

Table 6.2: Pooled regression estimates (P2)

| Variable | Coefficient |
|------------------------|-------------|
| Legal framework | |
| Legal indicator | 0.176* |
| Model contracts | -0.084 |
| Active trade unions | -0.351 |
| Author category | |
| Visual artist | 0.163 |
| Book authors | -4.009*** |
| AV translators | 0.705*** |
| AV journalists | 0.305 |
| Print journalists | 0.099 |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 15.2 per cent; AIC: 4.23; BIC: 4.28; mean VIF: 2.68; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.143

6.3.5 Regressions within individual author categories

In this section, the econometric models estimated for the reduced samples corresponding to each author category are presented. In the following estimations, we follow a three-step process:

- first we estimate models including the legal and collective bargaining indicators in their continuous form;
- second, we estimate the same model specification substituting the collective bargaining indicator with its two key constituent provisions (model contracts and the role of trade unions); and
- third, we estimate a model where we include all identified⁵⁰⁴ individual provisions.⁵⁰⁵

⁵⁰³ Section 12.4 offers a detailed representation and discussion of this testing process.

⁵⁰⁴ When conducting these estimations we include all identified legal provisions including the ones that were not incorporated in the construction of our legal indicator.

⁵⁰⁵ Throughout this process we make sure that the model's exposure to multicollinearity is limited. Multicollinearity is a phenomenon in which two or more predictor variables in a multiple regression model are highly correlated, meaning that one can be linearly predicted from the others with a non-trivial degree of accuracy. In this situation the coefficient estimates of the multiple regression may change erratically in response to small changes in the model or the data.

Journalists (audio-visual and print) are not analysed in this context due to the poor representation across sample countries. Specifically, 88 per cent of all income responses came from the UK, Germany and Denmark. The above are expected to confound the robustness of our derived conclusions due to lack of variation in the dependent variable and lack of representativeness due to the few included countries.

When estimating the impact of legal provisions on the remuneration of different types of authors it is important to note that the final model specifications may not include the same variables. The reason for this is that the sample of responses for each author category has a different breakdown of responses by country. Depending on the number and breakdown of responses by country, different legal provisions may end up being highly correlated between them causing multicollinearity concerns and confounding the model's robustness. For instance, think of two provisions; one legal provision exists in Germany, France and Spain while the second one exists only in Germany and France. If for an author category there are very limited responses for Spain, then these two provisions would be highly correlated and one would not be able to distinguish their individual effects. Accordingly, the selection of independent variables to be included in the final estimation specifications was guided by our need to limit the exposure of our derived conclusions to such concerns, ultimately resulting in different estimated equations across author categories.

Book Authors

Table 6.3 presents the output of the first model estimation for book authors. It can be observed that the degree of protection offered by the legal framework has an insignificant effect.⁵⁰⁶ Nevertheless, the legal indicator was built based on a number of different individual components. The impact of these different components (explored in section 0) is not always associated with increased average income. Thus, the above observation could be the result of a minority of specific provisions significantly affecting remuneration, as opposed to the aggregate index.

Moreover, consistent with our pooled sample regressions, the extent of collective bargaining does not significantly affect remuneration. This is an expected result given the observed correlation between the legal and collective bargaining indicators; in other words, with the legal indicator being insignificant we would not expect collective bargaining to be significant either.

Table 6.3: Book authors sample regression coefficients (B1)

| Variable | Coefficient |
|---------------------------------|-------------|
| Legal framework | |
| Legal indicator | 0.256 |
| Collective bargaining indicator | -0.081 |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 7.92 per cent; AIC: 5.24; BIC: 5.34; mean VIF: 3.53; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.673

The model specification presented in the table below illustrates the effects of the existence of model contracts and of the role of trade unions on book authors' remuneration. It can be observed that trade unions impose a significantly negative effect, while the effect of model contracts is insignificant, rendering the overall effect of collective bargaining insignificant (see B1). As the variable for trade unions accounts for active trade unions, and not for their specific activities, the observed negative effect can be perceived as the average result of the

⁵⁰⁶ Our results are robust to alternative legal indicator specifications involving the inclusion in its calculation of the legal provisions which were concluded from the legal analysis not to have a significant effect on authors' remuneration.

undertaken activities. Moreover, the insignificant effect of the degree of protection offered by the inherent legal frameworks persists.

Table 6.4: Book authors sample regression coefficients (B2)

| Variable | Coefficient |
|------------------------|-------------|
| Legal framework | |
| Legal indicator | 0.178 |
| Model contracts | 0.039 |
| Active trade unions | -2.300*** |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 8.22 per cent; AIC: 5.23; BIC: 5.32; mean VIF: 2.91; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.541;

Model B3, presented in Table 6.5, examines the impact of individual legal provisions across countries along with the two key collective bargaining provisions (model contracts and the role of trade unions). The selection of the included legal constituents was guided by the need to avoid multicollinearity among our independent variables, which would bias our derived conclusions.

Model estimates reported in the table below corroborate the above illustrating the positive and significant effect of limitations on scope on the income received from the latest publication of book authors. Limitations on the scope of transfer of rights ensure that authors do not grant overly broad assignments of rights and have been recognised in our analytical framework as a potentially positive effect on authors' remuneration.⁵⁰⁷

In contrast, formalities for the transfer of rights, rules on the form of payment, obligation to publish and non-usus have an insignificant effect. Similarly, limitations on future works and future modes of exploitation also impose an insignificant effect, which explains the overall insignificant effect of the legal indicator, presented in B1. As for the collective bargaining provisions, their effects presented in table above (Model B2) persist.

Table 6.5: Book authors sample regression coefficients (B3)

| Variable | Coefficient |
|--|---------------------------|
| Legal framework | |
| Limitations on scope | 1.677** |
| Formalities for the transfer of rights | -0.487 |
| Rules on form of payment | -3.380 |
| Obligation to publish/non-usus | -0.569 |
| Limitations on future mode | Not included [†] |
| Limitations on future works | Not included [†] |
| Best-seller clause | Not included [†] |
| Model contracts | 0.893 |
| Active trade unions | -1.90** |

[†] These legal framework constituents were not included due to multicollinearity concerns.

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 8.55 per cent; AIC: 5.23; BIC: 5.35; mean VIF: 4.00; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.805;

⁵⁰⁷ Fixed book price agreements could also positively affect book authors' remuneration. However, multicollinearity concerns limit our ability to conduct an econometric analysis on the impact of such provisions. Nevertheless, there exists some minor evidence of a positive effect at a univariate level as the total income from latest publication of book authors residing in countries with such provisions (DE, FR, NL, ES) is greater than that of book authors residing in countries that do not have such provisions.

Visual Artists

Table 6.6 presents the output of the first model estimation for visual artists. As in the pooled sample regression (Models P1 and P2), the degree of protection offered by the legal framework imposes a significantly positive effect on remuneration.⁵⁰⁸ In contrast, the extent of collective bargaining exhibits an insignificant effect.

The model specification also includes dummy variables for each individual visual artist category. Illustrators constitute the base category relative to which the effect of each of the remaining categories is estimated. It can be observed that designers in our sample earn a significantly higher income, on average, relative to illustrators in our sample, while no considerable differences are observed for photographers.

Table 6.6: Visual artists sample regression coefficients (VA1)

| Variable | Coefficient |
|---------------------------------|-------------|
| Legal framework | |
| Legal indicator | 0.263* |
| Collective bargaining indicator | -0.177 |
| Visual artist type | |
| Photographers | 0.011 |
| Designers | 0.437** |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 3.26 per cent; AIC: 4.13; BIC: 4.19; mean VIF: 2.23; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.476;

In Table 6.7 we include the two key collective bargaining provisions instead of the indicator. Similar to estimations within book authors, model contracts impose an insignificant effect while the influence of trade unions is negative and significant. As for the effect of the various visual artist types, similar to reported estimates in the above table (VA1), designers earn a significant premium, relative to illustrators, whereas the insignificant effect of photographers persists.

Table 6.7: Visual artists sample regression coefficients (VA2)

| Variable | Coefficient |
|---------------------------|-------------|
| Legal framework | |
| Legal indicator | 0.239* |
| Model contracts | 0.514 |
| Active trade unions | -1.113*** |
| Visual artist type | |
| Photographers | 0.024 |
| Designers | 0.446** |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 3.26 per cent; AIC: 4.13; BIC: 4.20; mean VIF: 3.37; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.456.

Lastly, in Table 6.8 we estimate the effects of the individual legal provisions on the remuneration of visual artists. In contrast to book authors, limitations on the scope of transfer of rights have an insignificant effect. Similarly, the influence exerted by obligation to publish and non-usus is not significantly different from zero.

⁵⁰⁸ Our results are robust to alternative legal indicator specifications involving the inclusion in its calculation of the scores corresponding to the legal provisions which were concluded from the legal analysis not to have a significant effect on authors' remuneration.

Nevertheless, the protection offered by adequate remuneration, proxied by the inherent rules on the form of payment is positive and statistically significant. Thus, adequate remuneration constitutes an important factor positively affecting visual artists' remuneration.

Lastly, consistent with our previous estimation (VA2), model contracts do not affect respondents' income, whereas the role of trade unions has a negative and significant effect.

Table 6.8: Visual artists estimation (VA3)

| Variable | Coefficient |
|--|---------------------------|
| Legal framework | |
| Limitations on scope | 0.167 |
| Obligation to publish/non-usus | -0.197 |
| Rules on form of payment | 0.539* |
| Formalities for the transfer of rights | Not included [†] |
| Limitations on future mode | Not included [†] |
| Limitations on future works | Not included [†] |
| Best-seller clause | Not included [†] |
| Model contracts | -0.304 |
| Active trade unions | -0.819** |

[†] These legal framework constituents were not included due to multicollinearity concerns.

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 2.69 per cent; AIC: 4.13; BIC: 4.18; mean VIF: 4.18; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.1622.

Audio-Visual translators

Table 6.9 presents the output of the first estimation within audio-visual translators. It can be observed that the degree of protection offered by the legal framework does not affect remuneration.⁵⁰⁹ In contrast, the extent of collective bargaining imposes a negative and significant effect.

Table 6.9: Audio-Visual translators estimation (AV1)

| Variable | Coefficient |
|---------------------------------|-------------|
| Legal framework | |
| Legal indicator | 0.013 |
| Collective bargaining indicator | -0.631** |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 6.96 per cent; AIC: 3.53; BIC: 3.71; mean VIF: 5.74; Prob (F-stat): 0.043; Ramsey RESET test Prob (F-stat): 0.229;

Reported estimates in Table 6.10 suggest that the aforementioned negative effect of the collective bargaining indicator (Model AVI) is highly likely to be sourcing from the negative effect exerted by the role of trade unions. In contrast, the existence of model contracts does not affect remuneration, while the insignificant effect of the legal indicator persists.

Table 6.10: Audio-Visual translators estimation (AV2)

| Variable | Coefficient |
|------------------------|-------------|
| Legal framework | |
| Legal indicator | 0.051 |
| Model contracts | 0.105 |
| Active trade unions | -1.289** |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes

⁵⁰⁹ Our results are robust to alternative legal indicator specifications involving the inclusion in its calculation of the legal provisions which were concluded from the legal analysis not to have a significant effect on authors' remuneration.

statistical insignificance. Adjusted R-squared: 6.25 per cent; AIC: 3.54; BIC: 3.75; mean VIF: 3.40; Prob (F-stat): 0.067; Ramsey RESET test Prob (F-stat): 0.229.

Lastly, in Table 6.11 we investigate whether individual constituents of the legal indicator impose a significant effect on the remuneration of audio-visual translators. Due to multicollinearity concerns, the final model specification included solely the dummy variable corresponding to limitations on the scope of transfer of rights. It can be observed that, similar to book authors, such legal provisions have a significantly positive effect on remuneration. The latter indicates the beneficial properties of legal requirements that protect audio-visual translators from overly broad assignments of rights, which could negatively affect income streams.

Table 6.11: Audio-visual translators estimation (AV3)

| Variable | Coefficient |
|--|---------------------------|
| Legal framework | |
| Limitations on scope | 0.907* |
| Obligation to publish/non-usus | Not included [†] |
| Rules on form of payment | Not included [†] |
| Formalities for the transfer of rights | Not included [†] |
| Limitations on future mode | Not included [†] |
| Limitations on future works | Not included [†] |
| Best-seller clause | Not included [†] |
| Model contracts | Not included [†] |
| Active trade unions | -0.837* |

* These legal framework constituents were not included due to multicollinearity concerns.

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 5.10 per cent; AIC: 3.54; BIC: 3.69; mean VIF: 2.63; Prob (F-stat): 0.072; Ramsey RESET test Prob (F-stat): 0.8579.

Literary translators

None of the tested econometric specifications generated any statistically significant results for literary translators given the universe of explanatory variables that were at our disposal.

6.3.6 Conclusions from econometric modelling

Overall, the reported results enhance our understanding of the determinants of authors' remuneration and corroborate the findings of the legal analysis.

First, the statistical analysis corroborates in full the conclusions of the legal analysis regarding legal measures of limited significance — those measures that the legal analysis suggested were likely to have relatively little contractual impact had no statistically significant impact either.

On the other hand, amongst those measures that the legal analysis indicated were significant, the statistical analysis suggests that a higher degree of protection offered by the legal framework is correlated with higher incomes for authors in our sample. This observation persists across estimations using both pooled and author specific samples.

By contrast, the extent of collective bargaining is in statistical terms less important. A decomposition of the collective bargaining indicators into their constituent components enhances our understanding of this. When we decompose the collective bargaining indicator, the presence of model contracts appears statistically insignificant across all examined author categories. By contrast, the existence of active trade unions is illustrated to have a *negative* average effect within author-specific estimations (i.e. when employed authors are in unions, the freelance authors in our sample obtain lower incomes).

Our econometric analysis also incorporates other control factors, apart from the legal and collective bargaining frameworks across countries that are expected to influence remuneration (as explored in Chapter 4). Use of agents or representatives is statistically significantly associated with higher incomes in our sample, especially in the case of book authors. Moreover, higher experience of authors is, on average, as one would expect, associated with higher remuneration in our sample.

7 Key Findings

7.1 Introduction

Our key findings consolidate and build upon the conclusions drawn from the previous chapters. As a first step, the conclusions drawn from the legal analysis and the section analysing the payment flows from all author categories are used as the foundations of our understanding of industry dynamics. Consistent with the fact that a core objective of this study is to assess how authors' remuneration is affected by the legal frameworks established in different Member States, we have laid the foundation for our key findings in the aspects of Member States' legal frameworks highlighted in our legal review (chapter 2).

Building on the findings of the legal review the payment flow analysis identified important counterparties that interact with authors, including the role they play in the assignment or transfer of rights and funds, and explored differences across Member States (chapter 3). In completing this process, we were then able to employ our analytical approach which aimed to explore the various aspects of the contracting process that can influence authors' remuneration (chapter 4). This allowed us to build a comprehensive list of indicators on which data could be collected, with the purpose of conducting a statistical analysis.

In order to statistically assess the impact of legal frameworks on remuneration, we must control for the potential role played by other factors. For this reason, the econometric models estimated include — in addition to legal indicators — a series of other control variables likely to influence remuneration (e.g. the type of author, his/her years of experience, whether an intermediary agent or representative is used, etc.).

In chapter 5, a description is provided of the process by which the theoretical expectations generated by the preceding analysis are transformed into data that can be used for descriptive analysis and econometric modelling purposes. Chapter 6 presented our statistical analysis and integrated all the pertinent information and data from previous chapters, in particular from the legal analysis. The econometric and statistical analyses are thus used as a tool to examine whether the legal findings can be corroborated and to explore them in more detail.

In the rest of this section, we first present the legal framework parameters that were identified as those most important for authors' remuneration and then examine whether the econometric analysis conducted on our sample of respondents reinforces these findings.

7.2 Key provisions of the legal framework

The main conclusion of our legal review was that there are two key factors influencing authors' remuneration levels:

- 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.

The protective measure we have found to have the most significant 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 requirement serves not

only as a means to ensure greater transparency of the transaction, but more importantly to circumscribe the scope of the transfer of rights, thereby strengthening the position of the author in her negotiations with the publisher. Moreover, it is settled case law in the Member States where this rule applies that, in case of doubt, the rights not specifically mentioned in the contract remain with the author. This protective measure is reinforced in the laws of some Member States by two complementary measures: first, by a prohibition (Poland, Spain) or restriction (e.g. Germany, the Netherlands) on the transfer of rights with respect to future modes of exploitation; and second, by a prohibition (e.g. France, Poland, Spain) or restriction (e.g. Germany, Hungary) on the transfers of rights with respect to future works. These statutory provisions establish minimum rules, usually mandatory, regarding the content of the contract. However, a small selection of contract clauses provided by the relevant European and national associations of authors suggests that at least some publishers may be disregarding the application of mandatory rules or taking advantage of loopholes in the legislation.⁵¹⁰

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, best-seller clause) 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. The requirement to put a transfer of rights in writing is relatively meaningless, if it is not accompanied by supporting restrictions concerning the scope of the transfer. Moreover, an important aspect of the clauses pertaining to the execution and termination of the contract is that they are rarely applied consensually; in most cases, the author must request the intervention of the judge to bring the publisher so far as to either engage in the actual publication of the work, revise the remuneration paid to the author if the initial payment turns out to be disproportional in the light of the revenues generated from the exploitation of the work, or terminate the agreement in case the publisher does not meet her contractual obligations. By requiring action to be taken by authors against the publishers therefore puts them in a position that might jeopardise their relationship with the latter; this could lead to authors being less willing to enforce such protective measures.

It is also important to note that, as we set out in Maths Example 2, a best-seller type of clause could have potentially adverse effects on the remuneration of non-best-selling authors. Publishers would have an incentive to offer lower remuneration on the basic contract as authors who believed they might be best sellers (and so eligible to receive more due to the best-seller clause) would be willing to accept a lower basic remuneration rate. At the same time, best-selling authors' contracts, in an environment where no best-seller clauses exist, are not necessarily non-renegotiation proof. Publishers would have incentives to renegotiate with successful authors as this would improve their relationship; this can be beneficial for future negotiations and as a means of fending off future competition for authors with a proven successful track record. Lastly, renegotiation before contract expiry could serve to better motivate best-selling authors, leading to a further improved (and more promptly submitted) final work.

The legal analysis also highlighted the obligation to comply with formalities, including the specification of rights assigned and the corresponding remuneration paid as an important provision.

The use of model contracts developed as a result of negotiations between representatives of authors and publishers was 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.

⁵¹⁰ For more details see section 2.7.1.

Trade unions, and CRMOs acting as trade unions, play a key role in developing and negotiating model agreements. This is the case for example in The Netherlands, where the CRMO, Lira, succeeded in negotiating model agreements in different sectors (literary books, educational books etc.) with the Dutch Association of Publishers. The benefits of unionisation, however, are most closely associated with employees, not freelancers. In fact, it could be that the remuneration and conditions of freelancers are at a disadvantage, relative to those of members of unions as the latter seek to enhance the pay and conditions for their affiliates. Faced with this issue, some Member States have introduced specific legislation pertaining to freelancers, as we explained earlier in our legal and contractual analysis.

7.3 Econometric findings

Our econometric analysis aimed at corroborating the key findings of the legal analysis based on a cross-sectional dataset which is comprised of survey responses. This generates an issue regarding the collected sample as we have lacked control over its representativeness: lack of representativeness can limit one's ability to make robust inferences. One aspect of this is that there was a lower response rate to our survey in several Member States and for a number of author categories. At the same time, while cross-sectional analysis was the only feasible approach, it does not allow for examination of the impacts of particular measures in one Member State over time.

Though many of these caveats are common to surveys conducted for regulatory purposes of the sort we are exploring here (and in the cases of other surveys for regulatory purposes, such caveats do not normally prevent the survey being useful for informing regulatory decision-making), they do limit the extent to which one could use these results to assess the relative impacts (in particular, dynamic impacts through time) of the legal frameworks in different Member States. Given that in this case we have complementary detailed legal analysis, one natural use for our statistical analysis is to corroborate and explore the findings of the legal analysis, flagging areas where findings diverge. A further point to emphasise is that our results do not provide insights into the impacts of the legal framework upon consumers. Legal frameworks that granted greater remuneration to authors could, in principle, lead to lower consumer welfare (e.g. because fewer works were published). This means that a finding that a certain framework leads to higher (or lower) author remuneration cannot be interpreted as implying that such a framework is therefore better (or worse), even setting aside impacts upon publishers.

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: a "core indicator" (based on provisions (1)-(3)), and a "complementary indicator" (based on provisions (4)-(7)).

The results of the econometric analysis corroborate these legal findings. More specifically, when estimating a model based on a pooled sample encompassing all author categories — and after controlling for the potential effect of additional variables that are likely to influence remuneration — we find that the "core indicator" has a positive and statistically significant impact on remuneration levels. In contrast, when the "core indicator" is replaced by the "complementary indicator" (which reflects the presence of only those legal provisions thought to play a less important role) the statistical significance disappears.

On the other hand, no statistically significant findings were observed within our pooled sample estimations for legal provisions under the "collective bargaining" umbrella, i.e. the existence of model contracts and the presence of active trade unions. There are a number of possible

explanations why a variable that might appear to be important, in theoretical terms, turns out not to be exerting particular influence. Some of the reasons relate to statistical caveats while others can relate to legal framework particularities that may not be captured by our created variables. Thus:

- Our econometric models are examining a static cross-sectional sample of respondents (a “snapshot”); this means that while the introduction of a particular measure (e.g. an active trade union) in one country might have improved remuneration conditions over time (in that country) this will not necessarily be reflected in a cross-sectional model if that country still has lower levels of remuneration compared to countries where the measure has not been implemented.
- Along the same lines as above, one measure might be a “symptom” present in low remuneration countries (e.g. a protective measure being implemented because authors’ remuneration has been observed to be low). However, if this dynamic is strong, and only countries with lower remuneration levels are the ones introducing a measure, then in a cross-sectional model it will appear that the measure has a negative effect on income. This is the well-established issue of correlation versus causation, where a high correlation between two parameters should, by no means, be interpreted as one parameter having caused the other. In the presence of a time dimension in the data (i.e. panel data), one could determine whether the introduction of a measure had a statistically significant effect on a particular country since it was introduced.
- There exist variable specific considerations pertaining both to the design and the measurement of variables that will be analysed in more detail when examining author specific conclusions. As an example, the effect captured by a binary variable reflecting the existence of model contracts might not be representative of the actual model contract dynamics that characterise a Member State’s framework.

However, these initial results do not allow for an examination of particular legal provisions that may be more important in driving the observed outcomes. Exploring the statistical influence of individual provisions can be highly informative and can illuminate differences in the underlying dynamics between a country’s legal framework and the resulting remuneration outcomes. Different author categories may be affected by particular legal provisions to varying extents. This expectation was verified when exploring more detailed models which treated different author categories separately and accounted for individual legal provisions.

In particular, book authors and audio-visual translators appear to benefit from limitations on the scope of transfer of rights (such as in France, Germany and Spain). Such limitations prohibit the granting of overly broad assignments of rights. Overly broad assignments could have detrimental effects on the remuneration of creators, such as book authors and audio-visual translators, whose final piece of work can be significant in size and requires a substantial investment of time to complete; it also requires extensive interaction with parties such as publishers and broadcasters. This can be viewed in conjunction with our chapter 3 description where publishers were identified as a very important counterparty for book authors and journalists and broadcasters for audio-visual translators. This result could serve as evidence that such limitations are effective in reducing the bargaining power of publishers and broadcasters.

The statistically significant influence on authors’ remuneration of such provisions is strongly supportive of the distinction made in the legal analysis between the effectiveness of ex-ante measures (such as the limitations on the scope of transfer of rights) and ex-post provisions (such as the obligation to publish, or the best-seller clause). The latter were recognised as less effective measures, in part because they require authors to act against their counterparties, and this is reinforced by the econometric findings.

Regarding the effect of the constituent provisions of the collective bargaining indicator, the presence of model contracts does not appear to be exerting a statistically significant effect on

the average remuneration levels of any category in our sample. Statistical reasons why this might be the case were presented earlier in this section. Conceptually, the mere existence of a model contract arrangement does not, in itself, imply that authors about to enter into contractual arrangements with a counterparty are better informed about the various aspects of their contractual agreements.

In order for the above to be the case, a model contract must satisfy two conditions; first it would have to be designed effectively and second it would have to be enforced accordingly. In market conditions where authors' counterparties have increased market power there is going to be an increased likelihood that neither of these two conditions will hold. This is just one example of a country having instituted such arrangements, which would be captured by our variable, but where the arrangements are not necessarily effective and could thus be misdirecting the average results.

In contrast, the existence of active trade unions is found to have a negative average effect across all individually examined author categories. Given that unionisation is often assumed to be associated with higher remuneration (both by supporters and opponents of unions), it is of interest to reflect upon how our statistical result here might be accounted for.

- As in the case of model contracts, our cross-sectional models are static and as such cannot capture variation over remuneration levels over time. This could imply that even though trade unions might have made a difference within a country since their establishment we would not be able to capture that effect. Our model would only be able to distinguish statistically important differences between countries for only the time period under consideration.
- Again, as in the case of model contracts, there is an issue of reverse causality that needs to be considered and which is particularly pronounced for the type of cross-sectional data that is being examined. In countries where the remuneration of authors is perceived to be low, there might be increased incentives to establish active trade unions. Indeed, unions might even arise specifically to offset the high bargaining power of exploiters (e.g. in countries where there were highly concentrated publishing or broadcasting markets). As explained above, since we cannot observe the effect of the trade union introduction in one specific country over time then what we might be capturing in our model is merely the fact that low remuneration countries have introduced trade unions. Instead, what we were originally after was to establish whether the introduction or presence of trade unions drives remuneration higher compared to the alternative of having no active trade unions.
- Unionisation is most closely associated with employees, not freelancers, whilst in our sample the vast majority of respondents are free-lancers. Greater unionisation could mean higher freelancer remuneration if freelancers benefitted from a free-riding effect as general remuneration levels rose. However, an equally (if not more) natural economic impact might be for remuneration and conditions for non-unionised labour to deteriorate as unions enhance the pay and conditions for their members.
- In our stylised mathematical model we found (Maths Example 3) that there could be a tendency for authors that believed themselves of higher quality not to join unions if publishers offered sufficiently attractive terms for subsequent publications once an author had proved her quality.
- Lastly, trade unions engage in a rather broad set of activities which gives a rather different meaning to the definition of a trade union as "active". While trade unions in two countries may be active in both cases, the types of activities they engage in can be substantially different and thus lead to results of varying significance for an authors' remuneration.

8 Policy Recommendations

Based on our findings we have developed three overarching policy options for consideration. These are presented and discussed at a high level below. We have sought to combine the findings of the economic analysis with the stronger elements of the legal analysis, taking account of the issues that appear recurrent in the legal debate and, in particular, in the context of unfair clauses. In light of the sample of clauses presented to us, some contractual provisions imposed by publishers would, if submitted to the assessment of a court, likely be considered abusive or even invalid. However, our understanding is that authors are ill-placed to enforce their rights in respect of such abusive contracts, because doing so would lead to a perceived or actual risk of their being black-listed by all publishers and thus unable to work. In such circumstances, neither the provisions of EU copyright law nor the principles of general contract law offer useful means of redress.

An alternative approach that might be more enforceable in practice would be to introduce statutory provisions establishing minimum mandatory rules pertaining to the content of publishing contracts used for all categories of authors considered in this study.

Much of our discussion here is expressed in terms of measures that would be likely to have the effect of strengthening the authors' contractual position vis-à-vis publishers (and, thus, potentially, their future remuneration) *ex ante*, that is, during the phase of contractual negotiation. We acknowledge that the same measures (or others) could in principle also be relevant measures to strengthen the position of publishers vis-à-vis authors under some circumstances, but our legal analysis suggests that these have not been the main concern of national legal frameworks up to now and our economic analysis suggests that it will typically be authors that have the weaker bargaining position.

The below recommendations should lead to mechanisms that help prevent what anecdote and legal traditions suggest is the prevalent tendency to secure unlimited, all-inclusive rights transfers in all cases or careless omissions as to what happens to the rights once contract is signed or the work delivered. We have focused upon options that our legal analysis and empirical evidence suggest have potentially material economic impacts.

The policy options⁵¹¹ are as follows:

- Policy 1: Specification of remuneration for individual modes of exploitation. This policy option links with the problems identified with respect to the transparency of modes of exploitation and remuneration arrangements for individual authors.
- Policy 2: Limit the scope for transferring rights for future works and future modes of exploitation. This policy option addresses the issues discussed in our key findings on the scope of transfer.
- Policy 3: Allowing economically dependent freelancers to claim employee status and rights.

We discuss these policy options in turn. However, first we establish the internal market significance of the issues we are analysing.

⁵¹¹ We note that these options should be interpreted here, and are interpreted in what follows, such that they are mutually reinforcing and consistent.

8.1 Internal market significance

At the level of contractual relationships between authors and exploiters, Internal Market issues are associated with a lack of transparency in national systems which may impact on the ability for authors to move between Member States.

In addition, existing differences between national laws applicable in the publishing and audio-visual sectors also create barriers to the functioning of the Internal Market at the level of exploitation of works and provision of services, which may in turn affect distribution models. This creates obstacles to the development of a Digital Single Market as intended by the European Commission in its Communication Towards a modern, more European copyright framework.⁵¹²

These differences between the Member States may create legal uncertainty and lead to greater transaction costs for parties active in the licensing of content. In particular, search and information costs involved in arranging licensing contracts in different Member States are likely to be significantly greater than under a harmonised regime. Legal uncertainty and transaction costs are imperfections in the market and may have an impact on the decision of whether or not to participate in the market for licensing content. The lack of a proper EU-wide licensing framework clearly hinders the development of new business models in the EU. While these problems associated with transaction costs and legal uncertainty arise clearly in relation to licensing practices of online service providers, they do not affect the legal and contractual practice between authors and publishers/producers.

Works of authors are both potentially and actually traded within the EU across Member State boundaries. This has a number of dimensions, such as:

- Authors working in languages used as a main first language across multiple Member States would (absent non-tariff barriers limiting the completion of the Single Market) typically be able to reach transferees or have their works published and sold in Member States where that language is spoken and read even if it is not the home Member State of the author or transferee.
- Authors working particularly in English but also in any of the other official or widely used languages of the European Union can and do make their works available to those in other Member States even when the language in question is not the first language of most native speakers in that Member State. That will be the case for example for:
 - newspapers (true of physical versions but particularly true of electronic versions — e.g. Italian-speaking staff working in Paris might frequently read online an Italian language newspaper produced in Milan); and
 - professional publications — e.g. an author of a technical academic journal published in Oxford might be purchased and read at universities in Mannheim, Tilburg or Stockholm.
- Photographers might have their works appear in a magazine or other publication in another Member State or in several Member States.
- An illustrator might produce pictures or cartoons that are then used in several Member States. For example, the new “Asterix and the Celts” book released in 2015 was initially published in 15 countries and 23 languages, including illustrations by Didier Conrad.⁵¹³
- Translators might operate in multiple Member States at the same time, either travelling or working online. For example, if one report written in the Czech Republic in Czech needed to be translated into Spanish and another report written in Romania in Romanian also

⁵¹² See “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework”, COM(2015) 626 final of 9.12.2015.

⁵¹³ <http://www.telegraph.co.uk/culture/culturenews/10402176/New-Asterix-comic-book-released.html>.

required such a translation, a Spanish translator based in Spain might provide such translation services.

If laws affecting remuneration and other contracting arrangements differ between Member States, that could create unequal opportunities to compete for authors from different Member States. For example, a French illustrator offering services to firms in Ireland and Italy might find that it was more difficult to compete with Italian illustrators in Italy than with the Irish illustrators in Ireland, simply because contractual rules in Italy were more problematic to negotiate and enforce than those in Ireland. This could therefore distort competition in the Single Market.

There could also be Single Market barriers if the principles for enforcing conditions in contracts differed between Member States. Authors seeking to offer their services in other Member States than their own might fear that they would not understand contract provisions or be confident about how and whether they could be enforced if such provisions and principles varied markedly between Member States. That could create a barrier to the offering of cross-border services.

By introducing EU-level measures to establish common principles for remuneration and related contracting terms, European authorities could reduce such barriers to the functioning of the Single Market.

A further Internal Market issue is that, absent common principles for remuneration and related contract terms, transferees (or, in cases where they have the bargaining power, authors) might have scope to engage in regulatory arbitrage or "jurisdiction shopping" by choosing to have the law under which their contracts are set be that which is most favourable to the transferee (respectively, author).

8.2 Policy 1: Specification of individual modes of exploitation and respective remuneration

The general principle behind this policy option, designed to increase legal clarity 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;⁵¹⁴ and
- a reporting obligation imposed on the transferee vis-à-vis the author.

The obligation to specify the rights and modes of exploitation covered by the transfer would apply to current and foreseeable uses or modes of exploitation at the time of signing the contract. This requirement is key in order to guarantee transparency of the rights transferred, broken down in actual uses or modes of exploitation. For example, 'digital exploitation' of a work is different from 'publishing', which is often regulated by law according to specific rules on 'publishing contracts'. However, 'digital exploitation' does not, in itself, entail a specific use. Within 'digital exploitation', different uses are currently feasible business models (download, pay-per-use, subscription, ad-based streaming) or are envisaged to become commercially viable in the near to mid future. In addition, it would be important for the law to clarify that all rights not expressly transferred to the publisher would be reserved to the author. This rule is recognised in the law of several Member States as a rule of interpretation of authors' contracts (*in dubio pro auctore*), but where it is not, it should be stated clearly.

⁵¹⁴ This would require all modes of exploitation to be covered.

By introducing a requirement of this kind, authors can be better informed about the conditions determining their remuneration when entering contractual agreement, as they can better monitor the publisher's subsequent compliance with the terms of the contract. The information asymmetry is tackled through the increased awareness of the terms and conditions that are being agreed on and the improvement in the capabilities for future monitoring of income flows. In practice, the legal obligation to specify the rights transferred gives authors a more solid basis to claim the payment of remuneration and to enforce it in court. French courts have over the years reiterated on numerous occasions the mandatory character of the relevant provision, often ruling in favour of the author.

These measures should help to address frequent contractual ambiguities resulting in, for instance, a '*double assignment of rights*' scenario (as explained in our legal and contractual analysis). In the same manner, a clear and explicit contractual description of the initial ownership and/or transfer of (certain) rights should facilitate the understanding of the legal implications under commission-based relationships.

Finally, a condition could be imposed on transferees to take reasonable and proportionate steps to make authors aware of the scope, and the associated level of remuneration, of any relevant transfer of rights. Proportionality can be a very important factor as it would strike a balance between the time required to complete the contracting process and the scale of the task to be undertaken.

This policy option does not seek to ensure that all authors receive the same, pre-determined level of remuneration for each mode of exploitation. Rather, the level of remuneration for each mode would continue to be a key point of discussion during contractual negotiations between authors and transferees, and could continue to be set by CRMOs for the rights that they manage. This means that the specific terms of the contract would continue to rest with the contracting parties.

The focus of this policy option is to increase transparency regarding the scope of transfer of rights and modes of exploitation that are covered by the contract. Remuneration should be specified for each individual mode of exploitation to the degree, and insofar as, doing so is reasonable and proportionate. As such, any intervention to ensure this may be relevant at the EU level as well as the national level as this may facilitate greater cross border transparency too. This would provide greater transparency to the authors in respect of their terms of payment, which should help to reduce the information problem facing them and could potentially thereby improve their bargaining position. Moreover, the resulting increased awareness of authors could help to ensure that they are in a position to benefit more appropriately from ex-post exploitation arising from new technological developments since they will be more aware of the forms of exploitation that are covered in their contracts (see also policy option 3).

Clearly, however, the feasibility of specifying remuneration for individual modes of exploitation will depend on the level of granularity required.

Such a policy raises a number of issues for consideration, in particular:

- The potential for increased administrative costs for transferees, and the impact such costs may have on remuneration.
- The need to ensure that contracts remain up-to-date as technology changes and creates changes in business models and modes of exploitation, and the potential costs associated with such efforts (also potentially applicable to policy option 2 and an issue for policy option 3 – see below).
- The ability of individual authors to negotiate remuneration for each mode of exploitation given the potential information asymmetry between individuals and the transferees, and the potential for contracts to become overly complicated and undermine any benefits in terms of transparency and monitoring.

- Should this be combined with a reporting, transparency requirement for transferees?

We consider each of these in turn.

8.2.1 Increased administrative costs

Firstly, an increase in administrative burdens for both transferees and authors might be observed, which would be increasing in the level of granularity in the definition of mode of exploitation. Transferees will need to incur initial one-off costs in order to bring their processes up to speed with the requirements introduced in the new specifications. The scale of these one-off costs will depend on the divergence of the contracting parties' current contracting practices compared to the required level of transparency. Moreover, there will be ongoing administrative and time costs for both parties (transferee and authors) associated with accurately representing the required detail information in communications to each author. To make this proposal feasible, it is thus very important that guidelines concerning the relevance, proportionality and reasonableness be included.

The point might be illustrated with an example. Suppose that a publisher were commissioning an article from a journalist or a photograph from a photographer. If there were some reasonable probability that the article or photograph would be franchised on, it would be relevant for the publisher to highlight for the author the remuneration terms concerning franchising, as well as the remuneration for the main commission. But if there were no realistic prospect of franchising, it might not be proportionate to burden the publisher and slow down the process of agreeing the deal by having to highlight remuneration in various irrelevant hypothetical and unlikely circumstances.⁵¹⁵

An important issue when it comes to incurring costs is that of "cost pass-through", which is the concept of understanding who bears the burden of potential cost increases. An ideal scenario for a seller of a product or service would be to pass the increased costs completely to the buyer in the form of higher prices. This is possible only in so far as such a price increase does not depress demand to an extent that outweighs the benefits of charging a higher price (i.e. revenue does not fall below what it would be in the absence of cost pass through). In a report prepared for the Office of Fair Trading (OFT) the main determinants of cost pass-through outcomes were identified as:⁵¹⁶

- the cost change idiosyncratic or industry wide;
- the price elasticity of demand and supply; and
- the presence of competition across the supply chain.

Hence, the negotiation of an author with the transferee will be significantly affected by the transferee's ability to pass-through any increased costs that arise (such as the administrative costs mentioned above) in the form of an increased final product price. If the exploiter is unable to pass the additional costs on to consumers and has a strong bargaining position vis-à-vis the author, then the author is likely to bear the burden of the additional costs in the form of lower remuneration. However, if the differential in bargaining power is very pronounced, the authors' market might be in a marginal position where reductions in remuneration might incentivise them to pursue their outside options. In such cases, passing the costs on to authors could destabilise the market as it would lead to a number of authors leaving the market. This would lead to the transferees absorbing the increase in costs as authors cannot absorb any further income reductions.

⁵¹⁵ A publisher could instead refer the author to model clauses on issues which might be considered "residual" in certain sectors. Whether that would be useful at the time of concluding the contract or sufficient should the circumstance arise, is not entirely clear.

⁵¹⁶ RBB Economics (2014), "Cost pass-through: theory, measurement and potential policy implications", Report for the Office of Fair Trading, February 2014.

Alternatively, if exploiters are able to pass through the costs or the author is in a strong bargaining position it is unlikely that the author's remuneration would be adversely affected by the additional administrative costs. In contrast to the previous scenario, the authors' strong bargaining position is associated with a very competitive transferees' landscape. In that case, the transferees may not be able to absorb the costs (as due to competitive forces the price they are charging will be very close to cost), leading to the author's absorbing the additional cost.

8.2.2 The cost of updating contracts

Costs would also derive from the frequency with which the contracts need to be renegotiated. The online exploitation of works is playing an increasingly large role in authors' remuneration. Consequently, given the dynamic nature of online exploitation business models and the pace of technological advances, imposed contractual requirements have an increased risk of becoming outdated. This would generate a need for regularly updating contractual terms, creating higher costs. The greater the detail in terms of the specifications, the more frequent such renegotiating would be.

The use of broader categories of modes of exploitation within the general set of overarching rights would ease this burden. However, this could result in a failure to improve substantially the transparency for authors, or to successfully capture business models in any of the existing categories, inaccurately categorise business models into wrong categories, and/or result in remuneration specifications that discourage distribution through particular channels.

The role of CRMOs in pre-agreeing some standard clauses (perhaps those that are less contentious or non-core), keeping track of the feasibility of business models and providing guidelines for negotiating these in the context of exploitation rights, would be key to warrant efficient contracting.

Finally, it is worth mentioning that these costs could also be incurred in regard to policy option 2, in the case that contracts need to be modified and/or extended to include new modes of exploitation or new works not contemplated under the original wording of the contract.

8.2.3 Information asymmetries

It would also be important to determine whether authors are in a good position to negotiate individual remuneration for each mode of exploitation. An information asymmetry is present in that respect, whereby transferees are better placed to understand/know the current potential of an author's work as well as the development (or creation) of various business models.

This informational disadvantage of authors can lead to sub-optimal contractual allocations for them as it puts them in a weaker bargaining position. Thus, merely ensuring that different individual modes of exploitation are explicitly covered in a contract does not guarantee superior outcomes for authors remuneration, as the monetisation of the additional channels of remuneration may not be optimum for them. Trade unions could play a role in offsetting such informational asymmetries. In particular, they could disseminate information on the different exploitation methods including information on sales data etc.

An additional challenge arises from the complexity of legal language, which can result in considerable jargon which cannot be comprehended by the authors who possess no such expertise. In essence, overcomplicating a contract would undermine the authors' ability to understand, negotiate and monitor their remuneration. This would be an offsetting factor as far as the benefits of specifying remuneration terms for individual modes of exploitation are concerned. The extent to which this would in reality be a problem is unclear, but the scale of the problem would be greater for authors that do not have access to legal representation. In

this context, a requirement that additional specifications or the key contractual information should be presented in a user-friendly manner could be considered (as is done in areas of the financial services industry, specifically Key Investor Information Documents (KIID) under UCITS IV).

8.2.4 Reporting and transparency requirements

While increasing transparency through the written specification of individual remuneration should help authors to gain a better understanding of their remuneration, in the absence of information on sales and the amount received from that source, for example, it is likely to be difficult for them to monitor their income to ensure that they are receiving the correct amounts. Therefore, in order to strengthen the transparency it might be useful to introduce requirements on transferees to provide breakdowns to reflect the revenue streams from the different sources specified in the contract. This should include (insofar as it is relevant to the remuneration contract) information on both the revenue earned by transferees of works from each of digital downloads, streaming, sale of physical books etc., the percentage of revenue that should be paid to the author (as per the contract) and the amount of money that has been paid to the author. This information would allow the creator to verify that the exploiter has complied with the terms of the contract, for example by paying the correct proportion of sales revenue to the author.

To illustrate what is being proposed here, let us use a highly stylised example. Suppose that the remuneration contract specifies that the author will receive a lump sum of €1,000 plus 1 per cent of revenues on physical works sold in Germany and 2 per cent of revenues on physical works sold in Italy, plus 0.5 per cent of revenues from downloads anywhere in the EU. Let us suppose that, at present, the practice for some transferee would be simply to pay the author €2,200 without any breakdown. The proposed requirement here would be that the transferee would have to set out how that €2,200 was calculated, e.g.

- €1,000 lump sum; plus
- €500, being 1 per cent of €50,000 in revenues received from physical sales in Germany; plus
- €600, being 2 per cent of €30,000 in revenues received from physical sales in Italy; plus
- €100, being 0.5 per cent of €20,000 in revenues from downloads across the EU.

We note that all that is being proposed is that the transferee set out the information the transferee itself must already have in order to calculate the author's remuneration. It is not proposed that the transferee surrender other commercially sensitive information that might be used, for example, by the author in setting up a rival publisher (say).

Insofar as transferees are not currently providing such breakdowns, such a requirement would imply a cost for transferees. The scale of this cost would depend on the nature of the information to be provided. Since we anticipate that the information provided should already be being collected by transferees if they are calculating (and checking the accuracy of) authors' remuneration properly, beyond the additional time to provide this to the individual, the costs should be minimal. Where costs are higher than this, that could only be because transferees are not currently going to the proper lengths to calculate authors' remuneration.

Insofar as current remuneration is based upon estimates (e.g. because technical barriers mean a precise calculation of downloads of various different categories is not possible), it seems likely that current contracts are inappropriately specified. However, insofar as basing contracts on vague estimates is appropriate or inescapable, technological developments that facilitate the monitoring of the actual use of works would allow transferees to make a more accurate assessment of the remuneration owed to authors for the use of their work. The more broadly accessible such technology is to transferees, the lower any cost impact would be.

8.3 Policy 2: Limit the scope for transferring rights for future modes of exploitation and future works

Another aspect that could have an impact on the remuneration of authors concerns the regulation of transfers of rights with respect to *future forms of exploitation* and to *future works*. 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 (for example only the rights for works created over the next five years are transferred) and in terms of genre of work covered by the transfer. As mentioned previously, the issue of the scope of transfer should be addressed not only in respect of the contractual agreements binding creators to transferees, but also in respect of the exploitation contracts set out by CRMOs. This matter could be more easily addressed at the national level but only EU intervention could deliver additional benefits in terms of a harmonised approach across Europe.

It should be noted that limitations on future modes of exploitation and future works are likely to be less relevant for authors that are generally paid a lump sum fee for an individual piece of work and have a specific contract in place for that piece of work, as this model intrinsically ensures their ability to renegotiate for each individual piece of work/creation. This would be more applicable to all categories except for book authors.

Germany offers an interesting illustration of this kind of policy; a strict prohibition on the transfer of rights in 'unknown' or 'unforeseen' forms of exploitation existed until 2002. Until 2002 German courts were required to develop criteria to assess whether a mode of exploitation was 'known' or not at the time when the parties signed the contract. As a result 'future or unknown forms of exploitation' were defined as those forms of use that are not technically possible or, even if so, the economic relevance of which is not known at the time of conclusion of the contract. Hence, a form of use was deemed to be new, when it is a clearly distinguishable economic and technical mode of exploitation of a work.⁵¹⁷

8.3.1 Future modes of exploitation

The exact nature of new exploitations, namely that they are unknown and unforeseen, is the source of the problem in this instance. It is extremely hard to predict *ex-ante* the optimum way to design a contract to cover all potential future modes of exploitation, and indeed it would be inappropriate to do so as it would be difficult to determine an appropriate level of remuneration if the mode of exploitation and associated business model are not yet clear. Given that the author cannot have a clear concept of such new modes of exploitation, they might be regarded as, *de facto*, unforeseen contingencies which, by their nature, could not have been negotiated in advance (since the author could not know what she was agreeing to).

Since we have proposed that non-specified rights and modes of exploitation should remain with the author, it would mean that unforeseen modes of exploitation would, by definition, remain with them. Ensuring that the author has an opportunity to negotiate the remuneration for a particular source of income when a new mode of exploitation becomes available means that they also have the opportunity to negotiate better terms if their bargaining position has improved (for example due to their works being successful in other modes of exploitation). Clearly this has an equal implication that those who may have achieved lower levels of success than anticipated when the original contract was signed may secure less favourable terms for

⁵¹⁷ BGH, 11 October 1990 (Videozweitauswertung I), GRUR 1991, p133, English translation in IIC 1991, p574; BGH, 26 January 1995 (Videozweitauswertung III), GRUR 1995, p212; see also: BGH, 13 May 1982 (Altverträge), GRUR 1982, p727.

the new mode of exploitation than they would have had it been set at the time of the original negotiation. As such, this policy may only result in a transfer of wealth from authors who have under-performed against expectation to those who have over-performed.

There is also a cost associated with the process of negotiating an additional contract (or addendum) for the new and unforeseen mode of exploitation. Specifically, this involves the time spent in the negotiation process and the administrative process of drafting the contract etc. Who would bear these additional costs is unclear. Even if it is the transferee that bears the cost of drafting the contract, both parties will need to commit time to the exercise, the author may also need to pay for their lawyer to review the document. Where the ultimate cost incidence will rest will, however, depend on the nature of the market and the price sensitivity of consumers and transferees. This may vary across industries and Member States.

Moreover, restricting the extent to which the exploiter can earn returns on the investment made in the author without engaging in a separate contractual negotiation may reduce the incentives for transferees to invest in the first place. For example, the exploiter would have less incentive to engage in marketing activities to promote a book if it will not necessarily reap the full rewards of her investment (e.g. because she may not receive revenues from new modes of exploitation).

An alternative policy design may be to allow the transfer of rights for future modes of exploitation subject to the author receiving adequate remuneration for the additional modes of exploitation, and with an option for the author to revoke the transfer of their rights if they are not satisfied with the remuneration offer. This is the approach that has been adopted in Germany since 2002. Nonetheless, we should also take into consideration the policy changes proposed under the new German draft law introduced in October 2015 as a result of the observed lack of 'bite' of the existing regulation and the prevalence of all-inclusive, lump-sum arrangements despite the calls for 'equitable remuneration'. In fact, the draft law introduces the possibility for the author to take third-party offers for commercial exploitation of certain uses if these are financially more interesting for him or her. In our view, following this idea, *unforeseen modes of exploitation* could be included in a contract, provided that the author is allowed, subject to a fixed delay for prior notice,⁵¹⁸ to negotiate an agreement with a third party who has made him or her a more favourable offer (subject to a sort of 'right of first refusal' or '*Vorkaufsrecht*' of the original transferee).

Therefore, if we combine the recommendations under policy option 1 and policy option 2, our envisaged scenario regarding modes of exploitation would entail:

- Specification of modes of exploitation. By definition, these would refer to existing or foreseen modes. Any other uses not expressly contemplated, would remain with the author.
- Prohibition of agreeing with a transferee on unforeseen modes of exploitation, implicitly contemplated in policy option 1, given that being unforeseen, they cannot be specified.

However, the law *could* envisage a *partial exception* to this prohibition by either: (i) allowing unforeseen modes of exploitation (under option 1) making them subject in this case to '*equitable remuneration*', as opposed to just any agreed remuneration between the parties, and/or reversion (potentially after a determined period of time) in case of a better third-party offer (as discussed above); or by (ii) granting the transferee a right of first refusal of the unforeseen mode of exploitation (which was retained by the author given it couldn't be specified under option 1).

In our view, the above situation and the interplay between both options as regards modes of exploitation, would allow the author and transferee to re-negotiate under new circumstances

⁵¹⁸ The German Draft allows the author to claim back her exploitation right ('*Nutzungsrecht*') after a period of five years.

without altering the original risk-taking, investment decision present during the negotiation process of the original contract. In so doing, it would avoid an oft-heard criticism that the transferee's original investment rationale is, to some extent, wiped out where a best-seller clause exists or that she would be reluctant to invest in an author and new business models if the commercial incentives to do so are lacking (i.e. the authors can choose to go with another transferee).

8.3.2 Future works

The time period over which any new works created will be transferred to the transferee has important implications for both the transferee and the author. On the one hand, a relatively short contract, which only covers works generated over the period of, say, a year creates a high degree of uncertainty for the author. From the transferee's perspective the incentive to invest in the author to develop and promote the individual is weaker if the contract covers only a limited portfolio of her work. Setting the duration to be very short may provide very limited incentives for the transferee to invest in promoting the author and creating a 'brand' since the transferee would know that one of its competitors could free-ride on this investment in the future. In contrast where the contractual agreement for future works extends over a longer time horizon, and by implication a greater number of creations, the incentive to invest in the author is greater, as they will have a larger body of creations and thus a larger potential revenue stream if the author is successful.

As we considered in the legal chapter, and with some detail, particularly, in the Unfair Clauses section, it would seem that contracts, with some regularity, demand the transfer of rights on the 'next three or five books/translations/articles', sometimes without specifying the genre. Often this leads to a blocking situation, when the transferee does not have the intention to publish, either for commercial (concerns over profitability etc.) or strategic reasons (e.g. a publisher might simply not be interested in a particular genre). In this case, as we also pointed out in the Unfair Clauses section, what appears to be the core issue is not so much the lack of remuneration associated to the exploitation of this future work, but rather the lack of obligations on the part of the transferee. Perhaps the most relevant one is, indeed, the obligation to publish. The exception to the prohibition of contracting rights on future works would apply as long as the transferee publishes within a specified period (or has reasonable justification not to).

We would, therefore, be inclined to support an exception to the prohibition on the possibility to transfer rights on future works related to:

- the works created within a specified time frame, or a specific number of works, whatever comes first; and
- the works created under a specific genre.

In each case, the calculation of the remuneration due for each work should be set out. In addition, these future works would be subject to an obligation of exploitation by the transferee within an established period of time.

An alternative to the above, similar to what we also conceived for the future modes of exploitation in 8.2.1, would entail the outright prohibition of a transfer of rights on future works (making it null and void, as under French law, for example), but offering the transferee a right of first refusal for any work of the same genre produced within [3 years] from the date of signature of the contract, for which remuneration will be paid. This would be subject, also, to an obligation to publish within an established time frame. If the transferee does not express her intention to publish the work within [2 months] from the offer, the author will be free to offer the work to another transferee.

Finally, another issue that we have encountered in our review of unfair clauses is one whereby remuneration for one work is used to compensate losses on a prior work. We understand, as a general rule, remuneration for different works should remain separate unless the transferee has made the author aware of the cross-financing scenario at the time of signing the initial contract. In this way, the freedom of contract and the different remuneration schemes are preserved while also establishing a clear investment rationale reflected in a particular arrangement.

Of course, there is a very fine balance in identifying the appropriate duration that would incentivise transferees to invest in the author while at the same time ensuring that new information on the author's quality and potential can be exploited by the author and the exploiter in a meaningful and timely manner in contract re-negotiations.

8.4 Policy 3: Explore allowing economically dependent freelancers to claim employee status and rights

It is in the nature of the sectors under consideration in this report that occasional freelancer-client relationships (e.g. where someone who normally works full-time in another job occasionally writes an article or has a photograph published) coexist with more structured and formal employee-employer relationships. Overlapping each of these 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. Sometimes in such situations – perhaps even sometimes in situations in which only one client is the source of all income – the practical reality is still that of freelancer and client. That might be so, for example, if the author worked very erratically (e.g. producing output only once every six months) and insisted on maintaining ownership of all her outputs.

But in other cases, where the “freelancer” works regular hours at the publisher’s offices or is closely monitored and disciplined by the publisher, the practical reality might be that of an employee-employer relationship and the use of a freelancer-client contracting arrangement might be designed so that the publisher can (within the scope that the law in some Member States currently allows) avoid costs associated with employed status.⁵¹⁹ As an illustration of the need to nuance legal frameworks defining the types of professional relationship between ‘workgivers’ and ‘worktakers’, it should be noted that some (but not all) individual Member States have already enacted specific legislation regarding non-employed but economically dependent freelancers in some sectors, as we explained earlier in our legal and contractual analysis.

As an example of the need to potentially nuance the types of professional relationship between ‘workgivers’ and ‘worktakers’, it should be noted that some Member States have indeed enacted specific legislation regarding *non-employed but economically dependent freelancers* in some sectors, as we explained earlier in our legal and contractual analysis. Indeed, Germany is among the few Member States that addresses, in its national law, the problem of collective bargaining by self-employed workers. Article 12a was introduced already in 1974 in the *Collective Bargaining Act* and allows specific categories of authors (mainly self-employed workers in the press and television sectors) under certain conditions, to benefit from the provisions of collective labour agreements. Similarly the French *Labour Code* provides that any agreement whereby a press undertaking ensures, for payment, the assistance of a professional journalist is deemed to be an employment contract. Whereas the exploitation rights on the

⁵¹⁹ Even when an author has two such clients, the practical reality might be that of having two jobs (e.g. if the author attended one publisher’s offices Monday to Thursday and another’s from Friday to Sunday).

journalists' articles are presumed to be exclusively assigned to their employer, French journalists fall pursuant to this provision under the scope of collective agreements.

One option might be to generalise this principle across the EU, so that authors that are sufficiently financially dependent upon one (or at most two) transferees have the right to be recognised as employees and, therefore, be entitled to be covered by the collective agreements concluded in the sector, receive payment in the form of salary and/or receive other benefits at par with normal employees.⁵²⁰ We emphasise that this would need to be a right rather than an obligation as there could be good reasons why an author benefitted from being a freelancer in ways other than the avoiding of tax or employee benefits obligations. For example, a transferee might have the policy of owning the works of employees, but a particularly successful author might be a freelancer precisely so as to retain ownership rights.

Insofar as pushing authors into freelancer status even though they were in substance employees were a device to reduce authors' ability to take up normal employee rights to collective bargaining via recognised trade unions⁵²¹, allowing economically dependent freelancers to be treated as employees could restore their collective bargaining rights. There is already some existing shift towards increasing the freedom of freelancers to enter into trade unions (notwithstanding standard competition concerns regarding such agreements). The recent decision of the CJEU in the FNV-KIEM case⁵²² may signify a shift in the role of trade unions. Commentators must still reflect on the consequences of this very important decision. At first glance, the decision would seem to open the door slightly wider to the possibility for associations of freelancers to legally negotiate collective bargaining agreements with associations of employers, within the limits of the rules on competition law, even without giving them a full status as employees.

Another option might be to establish, as the French legislator recently did, the possibility to declare an agreement entered into between professional organisations representing authors (unions and CRMOS) and transferees in a specific sector compulsory to all the authors and transferees of that sector. The agreement setting certain terms and conditions for the publication of works could be extended to the entire sector by decree from the relevant minister. This form of extension of contractual provisions to an entire sector is a known instrument in the labour sector. It could be a useful instrument in the publishing sector as well. In principle, no competition law issues would arise by extending sector agreements through government decision given it would not represent a case of collusion or contracts in restraint of trade.

Should the Commission want to consider this policy recommendation, we believe that further research should be conducted to explore the following issues:

- How common is it for freelancers to be economically dependent on one or two publishers?
- How common is it for de facto employees to be treated as freelancers in an attempt to evade obligations to grant pensions, healthcare or union rights?
- How variable is the effectiveness of enforcement of rules preventing employees being treated as freelancers in this sector, across Member States?
- What would be the most effective European-level legislative instruments to curtail attempts to circumvent the relevant laws and regulations in this area?

⁵²⁰ For instance, in Germany Article 12A allows specific categories of authors (mainly self-employed workers in the press and television sectors) to benefit, under certain conditions, from the provisions of collective labour agreements.

⁵²¹ Insofar as freelancers are correctly characterised as small businesses, collective agreements between them are commonly frowned upon as a form of prohibited concerted practice between undertakings, which has as its object or effect the prevention, restriction or distortion of competition in the Internal Market contrary to Article 101(1) TFEU. The rules of competition law thus generally preclude the collective negotiation of remuneration contracts for self-employed creators.

⁵²² C-413/13, Court of Justice of the European Union, decision of 4 December 2014 - FNV Kunsten Informatie en Media.

- Might measures to enforce the treatment of freelancers as employees have undesirable unintended consequences, such as facilitating cartels of successful self-employed authors or aiding publishers in preventing employees who want to become freelancers to have more control over their works from doing so?

9 Appendix 1: Distribution List for Remuneration Survey

Below is a list of the associations that we have contacted to help us with the distribution of the survey.

Table 9.1: List of association in our distribution list

| Association | Industry | Country |
|--|-----------------|----------------|
| Freier Deutscher Autorenverband | Authors | DE |
| Verband deutscher Schriftsteller | Authors | DE |
| Deutsche Journalistinnen und Journalisten Union (dju) in ver.di | Journalist | DE |
| Deutscher Journalisten-Verband | Journalist | DE |
| Bundesverband der Dolmetscher und Übersetzer | Translators | DE |
| Deutscher Verband der freien Übersetzer und Dolmetscher | Translators | DE |
| Verband der Übersetzer und Dolmetscher | Translators | DE |
| Verband deutschsprachiger Übersetzer literarischer und wissenschaftlicher Werke | Translators | DE |
| Interessenverband Comic | Visual artists | DE |
| Allianz Deutscher Designer | Visual artists | DE |
| Berufsverband der Kommunikationsdesigner | Visual artists | DE |
| Illustratoren Organisation | Visual artists | DE |
| Berufsverband freie Fotografen und Filmgestalter | Visual artists | DE |
| Centralverband Deutscher Berufsfotografen | Visual artists | DE |
| Deutscher Verband für Fotografie | Visual artists | DE |
| Freelens | Visual artists | DE |
| TEGNERNE | Visual artists | DE |
| Dansk Journalistforbund | Journalist | DK |
| Copydan Billedkunst | Visual artists | DK |

| Association | Industry | Country |
|---|-----------------|----------------|
| FEDERACION DE ASOCIACIONES DE LA PRENSA ESPANOLA (FAPE) | Journalist | ES |
| FEDERATIONS OF UNIONS OF JOURNALISTS (FeSP) | Journalist | ES |
| VEGAP | Visual artists | ES |
| Asociación Galega de Profesionais da Ilustración | Visual artists | ES |
| ASOCIACIÓN PROFESIONAL DE ILUSTRADORES DE MADRID | Visual artists | ES |
| ASSOCIACIO PROFESSIONAL D'IL-LUSTRADORS DE VALÈNCIAL | Visual artists | ES |
| ASSOCIACIÓ PROFESSIONAL D'IL-LUSTRADORS DE CATALUNYA | Visual artists | ES |
| Asociación Colegial de Escritores de España | Authors | ES |
| ALTF/EwC | Translators | EU / France |
| Syndicat National des Journalistes – CGT | Journalist | FR |
| Syndicat National des Journalistes – SNJ | Journalist | FR |
| Union Syndicale des Journalistes – CFDT | Journalist | FR |
| ADAGP, Société des Auteurs dans les Arts Graphiques et Plastiques | Visual artists | FR |
| Société des auteurs des arts visuels et de l'image fixe (SAIF) | Visual artists | FR |
| Société Civile des Auteurs Multimedia (SCAM) | Writers | FR |
| Société des gens de lettres (SGDL) | Writers | FR |
| Société française des intérêts des auteurs de l'écrit (Sofia) | Writers | FR |
| ATAA (Association des Traducteurs et Adaptateurs de l'Audiovisuel) | Translators | FR |
| Magyar Ujsagirok Orszagos Szovetsege (MUOSZ) | Journalist | HU |
| Főszerkesztők Fóruma | Journals | HU |
| HUNGART | Visual artists | HU |

| Association | Industry | Country |
|---|-----------------|----------------|
| MISZJE | Writers | HU |
| Irish Writers Union | Authors | IE |
| Irish Translators and Interpreters Association (ITIA) | Translators | IE |
| Institute of Designers in Ireland | Visual artists | IE |
| Design Business Ireland | Visual artists | IE |
| Illustrators Guild of Ireland | Visual artists | IE |
| Irish Professional Photographers Association | Visual artists | IE |
| Press Photographers Association of Ireland (PPAI) | Visual artists | IE |
| The Irish Visual Artists Rights Organisation (IVARO) | Visual artists | IE |
| Federazione Unitaria Italiana Scrittori | Authors | IT |
| SLC CGIL | Authors | IT |
| UNIONE NAZIONALE SCRITTORI E ARTISTI | Authors | IT |
| A.I.T.I | Translators | IT |
| A.N.I.T.I. | Translators | IT |
| SIAE / OLAF Department | Translators | IT |
| ANAFI | Visual artists | IT |
| Aiap | Visual artists | IT |
| Associazione Autori di Immagini | Visual artists | IT |
| A.F.I.P. International - Associazione Fotografi Professionisti | Visual artists | IT |
| Associazione Fotografi Naturalisti Italiani (ANFI) | Visual artists | IT |
| Associazione Italiana Reporters Fotografi | Visual artists | IT |
| FIAF - Federazione Italiana Associazioni Fotografiche | Visual artists | IT |
| ASSOCIAZIONE ILLUSTRATORI | Visual artists | IT |
| Vereniging van Educatieve Auteurs (VvEA) | Authors | NL |
| NEDERLANDSE VERENIGING VAN JOURNALISTEN (NVJ) | Journalist | NL |

| Association | Industry | Country |
|---|-------------------------|----------------|
| FreeLancers Associatie (FLA) | Journalists | NL |
| Beroepsvereniging Zelfstandige Ondertitelaars (BZO) | Translators | NL |
| BEROEPSORGANISATIE NEDERLANDSE ONTWERPERS | Visual artists | NL |
| Federation of Cartoonists Organisation (FECO) | Visual artists | NL |
| DuPho (Dutch Photographers) | Visual artists | NL |
| Vereniging van Letterkundigen (VvL) | Writers | NL |
| De Vereniging van Schrijvers en Vertalers | Authors and translators | NL |
| Stowarzyszenia Dziennikarzy Polskich | Journalist | PL |
| PROCARTOONISTS.ORG | Visual artists | UK |
| ASSOCIATION OF ILLUSTRATORS | Visual artists | UK |
| Design and Artists Copyright society (DACS) | Visual artists | UK |
| International Authors Forum | Writers | UK |
| The Society of Authors – Translators Associations | Authors and translators | UK |
| Subtle | Translators | UK |
| National Union of Journalists – NUJ (UK and Ireland) | Journalist | UK/IE |

10 Appendix 2: Remuneration Surveys

10.1 Authors of books and scientific journals

Background information

The information about your general background will help us better understand your answers in comparison to other respondents.

- 1) Which of the following activities are you most frequently involved in (if you belong to two or more of these categories please select the one you do the most frequently)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Author of books (fiction, non-fiction, educational books/textbooks and literature for children and young adults) | |
| Academic who authors (or has authored) scholarly works/academic research a) books b) academic journal articles c) both books and journal articles | |

- 2) In which country are you resident? [RESTRICT TO ONLY ONE RESPONSE]

| |
|-------------------------|
| Scroll-down menu |
| Denmark |
| France |
| Germany |
| Hungary |
| Italy |
| Lithuania |
| Netherlands |
| Poland |
| Spain |
| UK |
| Other |

IF SELECT OPTIONS 1, 2 a) or 2 c) in Q1 PROCEED TO Q3. IF OPTION 2b IN Q1 (I.E. ACADEMIC JOURNALS) PROCEED TO Q 26.

AUTHORS OF BOOKS ONLY

- 3) For how long have you been publishing your own books or have had your books published? [RESTRICT TO ONLY ONE RESPONSE]

| |
|-------------------------|
| Scroll-down menu |
| Less than 1 year |
| Between 1 and 2 years |
| Between 2 and 3 years |
| Between 3 and 4 years |
| Between 4 and 5 years |
| Between 5 and 10 years |
| Between 10 and 15 years |
| Between 15 and 20 years |
| More than 20 years |

- 4) How important to you is your income from the sales of books? Please select one of the following. [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll down menu | |
| It is my only source of income | |
| It is not my only source of income but it is the primary one | |
| It is a secondary source of income | |
| I have no income from it | |

- 5) How many of your books have been published (to note: please exclude books that you have self-published - these are covered in the following question)? [RESTRICT TO ONLY ONE RESPONSE FOR EACH COLUMN]

| | |
|-------------------------|--|
| Scroll down menu | |
| 0 | |
| 1 | |
| 2 | |
| 3 | |
| 4-6 | |
| 7-9 | |
| 10-15 | |
| 15-20 | |
| 20-30 | |
| More than 30 | |

- 6) How many of your books have you published yourself? [RESTRICT TO ONLY ONE RESPONSE FOR EACH COLUMN]

| | |
|-------------------------|--|
| Scroll down menu | |
| 0 | |
| 1 | |
| 2 | |
| 3 | |
| 4-6 | |
| 7-9 | |
| 10-15 | |
| 15-20 | |
| 20-30 | |
| More than 30 | |

- 7) Was your latest book published or did you self-publish it? When we refer to latest book we are interested in your latest **book that has been in circulation for a minimum of 2 years**. [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-------------------------|--|
| Scroll down menu | |
| Published | |
| Self-published | |

Please answer the following questions with respect to your latest book, as described in the previous question.

- 8) Were you the only author of this book? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-----|--|
| Yes | |
| No | |

- 9) How would you describe your latest book? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|----------------------------------|--|
| Fiction book | |
| Non-fiction book | |
| Educational book/textbook | |
| Children and young adults' book | |
| Academic research/scholarly work | |
| Other | |

All further questions in Section 2.2 should be answered with regard to your chosen book in Q6, referred to in all further questions as 'this book'.

- 10) Has this book been translated into other languages? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---------------|--|
| Yes | |
| No | |
| I do not know | |

- 11) If Q8 = "Yes", into how many languages has this book been translated? [RESTRICT TO ONLY ONE RESPONSE]

| |
|-----------------------|
| Drop down menu |
| 1 |
| 2 |
| 3 |
| ... |
| 30 |
| More than 30 |

12) In which year was this book first published? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-------------------------|--|
| Scroll down menu | |
| 2013 | |
| 2012 | |
| 2011 | |
| ... | |
| 1960 | |
| Earlier than 1960 | |

IF LATEST BOOK SELF-PUBLISHED IN Q. 7 SKIP TO Q.22, IF PUBLISHED PROCEED TO Q.13

13) What type of organisation published this book? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll-down menu | |
| Small organisation/company (e.g. trade publisher, educational publisher, STM publisher etc.) | |
| Small international organisation/company (e.g. trade publisher, educational publisher, STM publisher etc.) | |
| Large national/company (e.g. trade publisher, educational publisher, STM publisher etc.) | |
| Large international/company (e.g. trade publisher, educational publisher, STM publisher etc.) | |
| Public sector organisation | |
| Individual | |
| Other | |

Your contract

14) How did you negotiate your contract for this book? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll-down menu | |
| I used an agent | |
| I used another third party representative (e.g. a union) | |
| I negotiated myself because I had no other choice | |
| I negotiated myself because I believed I could achieve better conditions | |
| I was not able to negotiate my contract | |
| None of the above | |

15) Which of the following best describe the type of contract used in your agreement? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| A model contract provided by my trade association (union, etc.) | |
| A standard contract provided by the party (e.g. publisher) with whom I signed the contract | |
| A bespoke contract | |
| A contract based on a collective bargaining agreement which includes provisions on remuneration | |
| A contract based on a collective bargaining agreement which does not include provisions on remuneration | |
| No contract or only verbal contract | |
| None of the above | |

16) Please now consider the percentage of the book price you receive under this contract. If you have a bestseller type clause specifying a different percentage above a certain sales threshold, please provide only the basic percentage specified in your contract rather than this additional payment. Indicate this percentage for every one of the following categories, or leave blank if the category is not applicable.

| Categories | Indicate percentage between 0 and 100. |
|-------------------|---|
| Overall | |
| Hardback | |
| Paperback | |
| E-book | |

Your income

We would like to know about the average income you earn from publishing your own books or having your books published. Please be reassured that this information will remain confidential to Europe Economics and the Institute for Information Law and can in no way be linked back to you.

- 17) First, please indicate the currency in which you want to provide monetary figures.
[RESTRICT TO ONLY ONE RESPONSE]

| |
|-------------------------|
| Scroll-down menu |
| EUR |
| GBP |
| DKK |
| ... |

- 18) Did you receive advance payments from the publisher for this book? (These are any up-front payments made by the publisher from the signing of the contract up to the final acceptance and publication of your manuscript). [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-----|--|
| Yes | |
| No | |

- 19) If Q16="No", please specify why you did not receive advance payments from the publisher.
[RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll down menu | |
| Advance payments not stipulated in contract | |
| No opportunity to negotiate advance payments | |
| I waived the option of advance payments | |
| Other | |

- 20) If Q16="Yes", please specify the approximate total value of these advance payments.

| |
|---------------|
| Amount |
| |

- 21) To date, in total, approximately how much have you received from your publisher in additional payments (i.e. royalties) for this book.

| |
|---------------|
| Amount |
| |

- 22) On average, over the past two years approximately how much have you received per year from your collective management organisation?

| |
|---------------|
| Amount |
| |

Your experience

23) With respect to the book referred to in Q6, have you encountered any of the following problems? [SELECT ALL THAT APPLY]

| | |
|---|--|
| Answer | |
| There was no remuneration offered or included in my contract | |
| It was not clear how much remuneration I should receive for my work | |
| I did not receive the agreed remuneration | |
| I received no clear report on the royalties paid | |
| I could not verify the accuracy of the reporting on the sales of my work | |
| My work was published in a digital format without my knowledge and/or authorisation | |
| I tried to get my rights back but there was no legal possibility to terminate the contract or to opt-out | |
| I wanted to renegotiate the contract but there was no legal possibility. | |
| I had to accept a buy-out contract with a lump-sum in return for the transfer of all rights and in perpetuity | |
| My moral rights were not respected | |
| Other | |
| None of the above | |

IF LATEST BOOK PUBLISHED, END SURVEY OR SKIP TO Q.26 FOR JOURNAL ARTICLES. IF LATEST BOOK SELF-PUBLISHED GO TO Q.24

24) Why did you self-publish your latest book?

| | |
|--|--|
| Scroll down menu | |
| I could not find a publisher willing to publish my book | |
| I could not secure a contract with a publisher that I was happy with | |
| I felt that I would be better off self-publishing | |
| I did not want to transfer my rights for the book | |
| Other | |

25) To date approximately how much have you earned from the publication of this book?

| Scroll-down menu for currency | Amount |
|-------------------------------|--------|
| | |

QUESTIONS FOR ACADEMIC AUTHORS OF JOURNAL ARTICLES. ASK ONLY IF SELECT OPTION 2b or 2c IN Q1.

AUTHORS OF JOURNAL ARTICLES ONLY

26) How many years have you been publishing journal articles? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu |
|-------------------------|
| Less than 1 year |
| Between 1 and 2 years |
| Between 2 and 3 years |
| Between 3 and 4 years |
| Between 4 and 5 years |
| Between 5 and 10 years |
| Between 10 and 20 years |
| More than 20 years |

Your contract

27) In general how do you negotiate your agreement with the journal publisher? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu | |
|--|--|
| I use a third party representative (e.g. an agent) | |
| I negotiate myself because I have no other choice | |
| I negotiate myself because I can achieve better conditions | |
| I am not able to negotiate my contract | |

28) Was the mode via which the article would be published (i.e. electronic or hard copy) considered as part of the agreement? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu | |
|------------------|--|
| Yes | |
| No | |
| I do not know | |

29) Which of the following best describe the type of contract generally used in your agreement? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu | |
|---|--|
| A model contract provided by my trade association (union, etc.) | |

| | |
|--|--|
| A standard contract provided by the party (e.g. publisher) with whom I signed the contract | |
| A bespoke contract | |
| A contract based on a collective bargaining agreement which includes provisions on remuneration provisions | |
| A contract based on a collective bargaining agreement which does not include provisions on remuneration | |
| No contract or only verbal contract | |

Your income

We would like to know about the average income you earn from writing academic journal articles. Please be reassured that this information will remain confidential to Europe Economics and the Institute for Information Law and can in no way be linked back to you.

30) Which the following options best describes your situation in relation to the income you generate from the publication of academic journal articles? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll down menu | |
| It does not directly generate income for me, but I don't have to pay to publish | |
| It does not directly generate income for me, but I have to pay to publish | |
| It is my only source of income | |
| It is not my only source of income but it is the primary one | |
| It is a secondary source of income | |

31) How many journal articles have you had published in total? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-------------------------|--|
| Scroll down menu | |
| 1 | |
| 2 | |
| 3 | |
| 4-6 | |
| 7-9 | |
| 10-15 | |
| 15-20 | |
| 20-30 | |
| More than 30 | |

32) Please indicate the currency in which you want to provide monetary figures. [RESTRICT TO ONLY ONE RESPONSE]

| |
|-------------------------|
| Scroll-down menu |
| EUR |
| GBP |

| |
|-----|
| DKK |
| ... |

33) In the last two years, have you been paid for any of your articles? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-------------------------|--|
| Scroll down menu | |
| Yes | |
| No | |

34) If yes, on average, over the past two years approximately how much have you received per year from your collective management organisation?

| |
|---------------|
| Amount |
| |

Thank you for taking part in this research.

10.2 Journalists

Background information

The information about your general background will help us better understand your answers in comparison to other respondents.

1) Which of the following activities are you most frequently involved in as a journalist?

| | Select all that apply | Main activity (select only one) |
|-----------------------------------|-----------------------|---------------------------------|
| Newspaper journalist | | |
| Magazine & periodicals journalist | | |
| Web journalist | | |
| Video journalist | | |
| Radio journalist | | |
| Photo journalist | | |
| Other | | |

Please respond to the remainder of the survey based on the activity you have indicated to be your primary activity in the previous question.

2) In which country are you resident? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-------------|--|
| Denmark | |
| France | |
| Germany | |
| Hungary | |
| Italy | |
| Lithuania | |
| Netherlands | |
| Poland | |
| Spain | |
| UK | |
| Other | |

- 3) How many years have you been working in the main activity indicated in your response earlier? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-------------------------|--|
| Scroll-down menu | |
| Less than 1 year | |
| Between 1 and 2 years | |
| Between 2 and 3 years | |
| Between 3 and 4 years | |
| Between 4 and 5 years | |
| Between 5 and 10 years | |
| Between 10 and 20 years | |
| More than 20 years | |

- 4) How important to you is your income from your primary journalistic activity? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll down menu | |
| It is my only source of income | |
| It is not my only source of income but it is the primary one | |
| It is a secondary source of income | |
| I have no income from it | |

- 5) How do you carry out your primary activity?

| | |
|--|--|
| As a freelancer | |
| Under an employment contract | |
| Both (it depends on the specific work) | |

IF 'UNDER AN EMPLOYMENT CONTRACT', ANSWER Q6 AND Q7 AND END JOURNALISTS' SURVEY THERE, OTHERWISE CONTINUE TO Q8.

Your employment contract

- 6) Please indicate below who is your employer with regard to your primary activity? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small national private company/organisation (e.g. publishers, news agencies) | |
| Large national private company/organisation (e.g. publishers, news agencies) | |
| Small international private company/organisation (e.g. publishers, news agencies) | |
| Large international private company/organisation (e.g. publishers, news agencies) | |

| | |
|----------------------------|--|
| Public sector organisation | |
| Individual | |
| Other | |

7) With regard to your contract, did you experience any of the following?

| | |
|---|--|
| Scroll-down menu | |
| A contract claiming complete ownership of your work | |
| A contract claiming a broad license to use your work without limitation | |
| A contract claiming the right to use your work in other publications, but that allows you to receive payments for secondary uses | |
| A contract covering both digital and print publication (if appropriate) | |
| A contract that specifies the inclusion of your work in digital archives of the employer and thus may be accessible to other employees, the company network and/or the general public | |
| None of the above | |

Your freelance contract

The following questions relate to your work as a freelancer only.

8) Please indicate below who is your main client/the main purchaser of your work for your main journalistic activity (as indicated in your response to Q1)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll-down menu | |
| Small organisation/company (e.g. news agencies, publishers, broadcasters etc.) | |
| Small international organisation/company (e.g. news agencies, publishers, broadcasters etc.) | |
| Large national/company (e.g. news agencies, publishers, broadcasters etc.) | |
| Large international/company (e.g. news agencies, publishers, broadcasters etc.) | |
| Public sector organisation (e.g. news agencies, publishers, broadcasters etc.) | |
| Individual | |
| Other | |

9) In relation to the work you do for your main customer/ the main purchaser of your work, how do you negotiate your payment contracts (tick those options that apply)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| I used an agent | |
| I used another third party representative (e.g. a union) | |
| I negotiated myself because I had no other choice | |
| I negotiate myself because I believed I could achieve better conditions | |
| I accept the conditions settled by the customer without negotiation | |
| None of the above | |

- 10) Which of the following best describe the type of contract generally used in your agreement?
[RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| A model contract provided by my trade association (union, etc.) | |
| A standard contract provided by the party (e.g. news agency, broadcaster) with whom I signed the contract | |
| A bespoke contract | |
| A contract based on a collective bargaining agreement which includes provisions on remuneration | |
| A contract based on a collective bargaining agreement which does not include provisions on remuneration | |
| No contract or only verbal contract | |
| None of the above | |

- 11) With respect to your contract, have you encountered any of the following problems?

| | |
|---|--|
| Answer | |
| There was no remuneration offered or included in my contract | |
| It was not clear how much remuneration I should receive for my work | |
| I did not receive the agreed remuneration | |
| I received no clear report on the royalties paid | |
| I could not verify the accuracy of the reporting on the sales of my work | |
| My work was published in a digital format without my knowledge and/or authorisation | |
| I tried to get my rights back but there was no legal possibility to | |

| | |
|---|--|
| terminate the contract or to opt-out | |
| I wanted to renegotiate the contract but there was no legal possibility. | |
| I had to accept a buy-out contract with a lump-sum in return for the transfer of all rights and in perpetuity | |
| My moral rights were not respected | |
| Other | |
| None of the above | |

Your income

We would like to know about the average income you earned in the activities you indicated being involved in the section above. Please be reassured that this information will remain confidential to Europe Economics and the Institute for Information Law and can in no way be linked back to you. **Please answer the following questions with respect to your primary journalistic activity.**

- 12) First, please indicate the currency in which you want to provide monetary figures.
[RESTRICT TO ONLY ONE RESPONSE]

| |
|-------------------------|
| Scroll-down menu |
| EUR |
| GBP |
| DKK |
| ... |

Now, consider the freelance work you have done as a journalist over the last two years. For the purpose of this study we are interested in the earnings that you have generated in one of the following ways (i.e. not including journalistic work carried out under an employment contract):

- Earnings from commissioned work, i.e. articles you wrote or audio-visual material that you recorded on behalf of a third party.
- Earnings you made from independently selling articles that you wrote or audio-visual material that you recorded.

- 13) What percentage of your average annual earnings over the last 2 years as a freelance journalist was generated from commissioned work? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu |
|-------------------------|
| 0% |
| Less than 10% |
| 10%-20% |
| 20%-30% |
| ... |
| 100% |

14) [if Q12>0%] Please indicate how much you get paid on average for a commissioned assignment (this could be, e.g. an article, a set of articles, or audio-visual material) and approximately how many assignments you were commissioned for in each of the following categories over the last two years. [RESTRICT TO ONLY ONE activity]

| | Typical measure of assignment length | Average length of typical commissioned assignment | Average fee per typical commissioned assignment | Approximate number of assignments commissioned each year |
|------------------|--|--|--|---|
| Primary activity | Allow number of words, printed lines, pages, articles, photographs, hours/days worked, shooting days, minutes of recording, broadcasts and videos. | | | |

15) [Only if Q12<100%] Now consider non-commissioned work that you have sold, e.g. articles, voice recordings, photos or videos, as part of your primary journalistic activity over the past two years. What was the annual average payment you received for such work, the average length of the work and the approximate number of pieces of such work you have sold?

| Typical measure of length | Average length | Average annual payment | Approximate number of pieces sold |
|--|--------------------------------------|-------------------------------|--|
| Allow only pages, number of photographs or days worked | In number of units specified earlier | | |

16) Over the last two years, approximately, how much did you receive in additional payments for your published and/or broadcasted material? (These additional payments include private

copying and reprography levies, payments for rebroadcasting, or other secondary usage of your articles and/or audio-visual work). Please indicate if possible the amounts received from your collective management organisation and the one received from your main customer/the main purchaser of your work. For the main customer/purchaser of your work please provide your responses, if possible, with regards to your primary activity. If this is not possible please simply indicate the total amount you have received and the approximate percentage related to your primary activity.

| | Amount related to primary activity |
|------------------------------------|---|
| Collective management organisation | |
| Main customer/purchaser | |

OR

| | Total amount | Approx. percentage related to primary activity |
|------------------------------------|---------------------|---|
| Collective management organisation | | |
| Main customer/purchaser | | |

17) What was the average annual income you received for both commissioned articles/AV work and independent selling of articles/AV work over the last two years? Please respond with regards to your primary activity.

| |
|----------------------------|
| Please indicate the amount |
| |

Thank you for taking part in this research.

10.3 Translators

Background information

The information about your general background will help us better understand your answers in comparison to other respondents.

1) Which of the following activities are you most frequently involved in as a translator?

| Scroll-down menu (multiple options allowed) | | My main activity (select only one) |
|---|--|------------------------------------|
| Translation of poems | | |
| Translation of fiction books | | |
| Translation of non-fiction books | | |
| Translation of educational books/textbooks | | |
| Translation of books for children and young adults | | |
| Translation of academic/technical books | | |
| Translation of newspaper/magazine articles | | |
| Advertising / commercial translation | | |
| Other category of literary translation | | |
| Inter-lingual subtitling | | |
| Translation of voiceover script for documentaries and films | | |
| Dubbing (lip synch or voiceover) translation | | |
| Live subtitling translation for live broadcasts translator | | |
| Subtitle translation for the deaf and hard of hearing | | |
| Translation for audio description for the blind and partially sighted | | |
| Other category of audio-visual translation | | |

2) In which country are you resident? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu | |
|-------------------------|--|
| Denmark | |
| France | |
| Germany | |
| Hungary | |
| Italy | |
| Lithuania | |
| Netherlands | |
| Poland | |
| Spain | |
| UK | |
| Other | |

3) How many years have you been doing work in the primary activity indicated in your earlier response? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu |
|-------------------------|
| Less than 1 year |
| Between 1 and 2 years |
| Between 2 and 3 years |
| Between 3 and 4 years |
| Between 4 and 5 years |
| Between 5 and 10 years |
| Between 10 and 20 years |
| More than 20 years |

4) Which of the following languages do you do translation work from and to regarding your primary activity?

| FROM (Scroll down list) | TO (Scroll down list) |
|--|--|
| Basque | Basque |
| Bulgarian | Bulgarian |
| Catalan | Catalan |
| Croatian | Croatian |
| Czech | Czech |
| Danish | Danish |
| Dutch | Dutch |
| English | English |
| Estonian | Estonian |
| Finnish | Finnish |
| French | French |
| Galician | Galician |
| German | German |
| Greek | Greek |
| Frisian | Frisian |
| Hungarian | Hungarian |
| Irish (Gaelic) | Irish (Gaelic) |
| Italian | Italian |
| Latvian | Latvian |
| Lithuanian | Lithuanian |
| Luxembourgish | Luxembourgish |
| Maltese | Maltese |
| Polish | Polish |
| Portuguese | Portuguese |
| Romanian | Romanian |
| Scottish (Gaelic) | Scottish (Gaelic) |
| Slovak | Slovak |
| Slovenian | Slovenian |
| Spanish | Spanish |
| Swedish | Swedish |
| Welsh | Welsh |
| Turkish | Turkish |
| Russian | Russian |
| Ukrainian | Ukrainian |
| Japanese | Japanese |
| Chinese | Chinese |
| Other | Other |

- 5) How important to you is your income from your primary activity as indicated by your response to Q1? Please select one of the following. [RESTRICT TO ONLY ONE RESPONSE]

| Scroll down menu | |
|--|--|
| It is my only source of income | |
| It is not my only source of income but it is the primary one | |
| It is a secondary source of income | |
| I have no income from it | |

- 6) How do you carry out your primary activity as indicated by your response to Q1? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| As a freelancer | |
| Under an employment contract | |
| Both (it depends on the specific translation work) | |

IF 'UNDER AN EMPLOYMENT CONTRACT', ANSWER Q7 AND Q8 AND END PHOTOGRAPHERS' SURVEY THERE, OTHERWISE CONTINUE TO Q9.

Your employment contract

7) Please indicate below who is your employer with regard to your primary activity? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small national private company/organisation (e.g. publishers, news agencies) | |
| Large national private company/organisation (e.g. publishers, news agencies) | |
| Small international private company/organisation (e.g. publishers, news agencies) | |
| Large international private company/organisation (e.g. publishers, news agencies) | |
| Public sector organisation | |
| Individual | |
| Other | |

8) With regard to your contract, did you experience any of the following?

| | |
|---|--|
| Scroll-down menu | |
| A contract claiming complete ownership of your work | |
| A contract claiming a broad license to use your work without limitation | |
| A contract claiming the right to use your work in other publications, but that allows you to receive payments for secondary uses | |
| A contract covering both digital and print publication (if appropriate) | |
| A contract that specifies the inclusion of your work in digital archives of the employer and thus may be accessible to other employees, the company network and/or the general public | |
| None of the above | |

Your freelance contract

The following questions relate to your work as a freelancer.

- 9) Please indicate below who is your main client/the main purchaser of your work for your main activity? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small organisation/company (e.g. trade publisher, educational publisher, STM publisher, news agency, broadcaster, other specialised firm) | |
| Small international organisation/company (e.g. trade publisher, educational publisher, STM publisher, news agency, broadcaster, other specialised firm) | |
| Large national/company (e.g. trade publisher, educational publisher, STM publisher, news agency, broadcaster, other specialised firm) | |
| Large international/company (e.g. trade publisher, educational publisher, STM publisher, news agency, broadcaster, other specialised firm) | |
| Public sector organisation | |
| Individual | |
| Other | |

- 10) In relation to the work you do for your main customer/ the main purchaser of your work, how do you negotiate your payment contracts (tick those options that apply)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| I used an agent | |
| I used another third party representative (e.g. a union) | |
| I negotiated myself because I had no other choice | |
| I negotiate myself because I believed I could achieve better conditions | |
| I accept the conditions settled by the customer without negotiation | |
| None of the above | |

- 11) Which of the following best describe the type of contract generally used in your agreement? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll-down menu | |
| A model contract provided by my trade association (union, etc.) | |
| A standard contract provided by the party (e.g. publishers, broadcaster) with whom I signed the contract | |
| A bespoke contract | |

| | |
|---|--|
| A contract based on a collective bargaining agreement which includes provisions on remuneration | |
| A contract based on a collective bargaining agreement which does not include provisions on remuneration | |
| No contract or only verbal contract | |
| None of the above | |

12) With respect to your contract, have you encountered any of the following problems?

| | |
|---|--|
| Answer | |
| There was no remuneration offered or included in my contract | |
| It was not clear how much remuneration I should receive for my work | |
| I did not receive the agreed remuneration | |
| I received no clear report on the royalties paid | |
| I could not verify the accuracy of the reporting on the sales of my work | |
| My work was published in a digital format without my knowledge and/or authorisation | |
| I tried to get my rights back but there was no legal possibility to terminate the contract or to opt-out | |
| I wanted to renegotiate the contract but there was no legal possibility. | |
| I had to accept a buy-out contract with a lump-sum in return for the transfer of all rights and in perpetuity | |
| My moral rights were not respected | |
| Other | |
| None of the above | |

Your income

First we would like you to answer some questions that can help us understand what an average contract between yourself and your clients, over the last two years, would be like.

13) Please indicate the currency in which you want to provide monetary figures.

| |
|-------------------------|
| Scroll-down menu |
| EUR |
| GBP |
| DKK |
| ... |

14) What percentage of your work relates to first language translations?

| | |
|-------------------------|--|
| Scroll-down menu | |
| 0% | |
| Less than 10% | |
| 10%-20% | |
| 20%-30% | |
| ... | |
| 100% | |

15) Please indicate, based on the past two years:

- a) on average how much your basic fee has been for a typical assignment (this could be, e.g. a translation of a book, a poem, or the subtitling of a movie);
- b) what is the length of a typical assignment (in words, pages, minutes of recording or number of days spent); and
- c) approximately how many assignments have you undertaken each year.

Once again this question relates to your primary activity. Please provide your answers both for first language and second-language translations.

| | Average basic fee for typical assignment | Average length of assignment | Approximate number of assignments |
|--|---|--|--|
| First language translations relating to your primary activity | | Allow answer only in words, pages, minutes of recording and days spent | |
| Second language translations relating to your primary activity | | Allow answer only in words, pages, minutes of recording and days spent | |

16) Please think about your primary rights (i.e. your right to royalties for the use of your work in published forms) and subsidiary rights (i.e. your share from the sale of rights). In general,

over the past two years, what percentage have you received for these rights in your contracts?

| Type of right | First language translations | Second language translations |
|--|-----------------------------|------------------------------|
| Primary rights (royalties from use of work in published forms) | | |
| Subsidiary rights (from share of rights sales) | | |

17) Over the last two years, approximately, how much have you received in additional payments for secondary uses of material that you translated on average each year? (These additional payments include private copying or reprography levies, payments for broadcasting, or other secondary uses of your translations). Please indicate if possible the amounts received from your collective management organisation and the main customer/the main purchaser of your work separately. For the main customer/purchaser of your work please provide your responses, if possible, with regards to your primary activity. If this is not possible please simply indicate the total amount you have received and the approximate percentage related to your primary activity.

| | Amount |
|------------------------------------|--------|
| Collective management organisation | |
| Main customer/purchaser | |

OR

| | Total amount | Approx. percentage related to primary activity |
|------------------------------------|--------------|--|
| Collective management organisation | | |
| Main customer/purchaser | | |

18) On average over the last two years, approximately what was the total income you received for your freelance work over each year?

| |
|----------------------------|
| Please indicate the amount |
| |

Thank you for taking part in this research.

10.4 Visual artists

Background information

The information about your general background will help us better understand your answers in comparison to other respondents.

- 1) Which of the following categories of visual artists best describes your profession? Please select all that apply noting that a separate questionnaire will be provided for each of the indicated categories.

| | |
|-------------------------|--|
| Scroll-down menu | |
| Photographer | |
| Designer | |
| Illustrator | |

IF SELECT OPTION 1 in Q1 PROCEED TO Q2. IF OPTION 2 IN Q1 (I.E. DESIGNER) PROCEED TO Q16 and IF OPTION 3 in Q1 (I.E. ILLUSTRATOR) THEN PROCEED TO Q30.

PHOTOGRAPHERS ONLY

- 2) Which of the following activities are you most frequently involved in as a photographer? (Please tick those that apply).

| Scroll-down menu | | Main activity (select only one) |
|------------------------------------|--|---------------------------------|
| Advertising/commercial photography | | |
| Nature photography | | |
| Photo journalism | | |
| Architecture photography | | |
| Other | | |

3) In which country are

you resident? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-------------------------|--|
| Scroll-down menu | |
| Denmark | |
| France | |
| Germany | |
| Hungary | |
| Italy | |
| Lithuania | |
| Netherlands | |
| Poland | |
| Spain | |
| UK | |
| Other | |

- 4) How many years have you been working in the main activity indicated in your response to Q2? [RESTRICT TO ONLY ONE RESPONSE]

| |
|-------------------------|
| Scroll-down menu |
| Less than 1 year |
| Between 1 and 2 years |
| Between 2 and 3 years |
| Between 3 and 4 years |
| Between 4 and 5 years |
| Between 5 and 10 years |
| Between 10 and 20 years |
| More than 20 years |

- 5) How important to you is your income from your primary activity as indicated by your response to Q2? Please select one of the following. [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll down menu | |
| It is my only source of income | |
| It is not my only source of income but it is the primary one | |
| It is a secondary source of income | |
| I have no income from it | |

- 6) How do you carry out your primary activity as indicated by your response to Q2?

| | |
|--|--|
| As a freelancer | |
| Under an employment contract | |
| Both (it depends on the specific work) | |

IF 'UNDER AN EMPLOYMENT CONTRACT', ANSWER Q7 AND Q8 AND END PHOTOGRAPHERS' SURVEY THERE, OTHERWISE CONTINUE TO Q9.

Your employment contract

- 7) Please indicate below with regard to your primary photographic activity? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small national private company/organisation (e.g. publishers, news agencies) | |
| Large national private company/organisation (e.g. publishers, news agencies) | |
| Small international private company/organisation (e.g. publishers, news agencies) | |
| Large international private company/organisation (e.g. publishers, news agencies) | |
| Public sector organisation | |
| Individual | |
| Other | |

- 8) With regard to your contract, did you experience any of the following?

| | |
|--|--|
| Scroll-down menu | |
| A contract claiming complete ownership of your work | |
| A contract claiming a broad license to use your work without limitation | |
| A contract claiming the right to use your work in other publications, but that allows you to receive payments for secondary uses | |
| A contract covering both digital and print publication (if appropriate) | |

| | |
|---|--|
| A contract that specifies the inclusion of your work in digital archives of the employer and thus may be accessible to other employees, the company network and/or the general public | |
| None of the above | |

Your freelance contract

- 9) Please indicate below who is your main client/the main purchaser of your work for your main activity (as indicated in your response to Q2)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small national private company/organisation (e.g. publishers, news agencies) | |
| Large national private company/organisation (e.g. publishers, news agencies) | |
| Small international private company/organisation (e.g. publishers, news agencies) | |
| Large international private company/organisation (e.g. publishers, news agencies) | |
| Public sector organisation | |
| Individual | |
| Other | |

- 10) In relation to the work you do for your main customer/ the main purchaser of your work, how do you negotiate your payment contracts (tick those options that apply)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll-down menu | |
| I used an agent | |
| I used another third party representative (e.g. a union) | |
| I negotiated myself because I had no other choice | |
| I negotiated myself because I believed I could achieve better conditions | |
| I accepted the conditions settled by the customer without negotiation | |
| None of the above | |

- 11) Which of the following best describe the type of contract generally used in your agreement? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll-down menu | |
| A model contract provided by my trade association (union etc.) | |

| | |
|---|--|
| A standard contract provided by the party with whom I signed the contract | |
| A bespoke contract | |
| A contract based on a collective bargaining agreement which includes provisions on remuneration | |
| A contract based on a collective bargaining agreement which does not include provisions on remuneration | |
| No contract or only verbal contract | |
| None of the above | |

12) With respect to your contract, have you encountered any of the following problems?

| Answer | |
|---|--|
| There was no remuneration offered or included in my contract | |
| It was not clear how much remuneration I should receive for my work | |
| I did not receive the agreed remuneration | |
| I received no clear report on the royalties paid | |
| I could not verify the accuracy of the reporting on the sales of my work | |
| My work was published in a digital format without my knowledge and/or authorisation | |
| I tried to get my rights back but there was no legal possibility to terminate the contract or to opt-out | |
| I wanted to renegotiate the contract but there was no legal possibility. | |
| I had to accept a buy-out contract with a lump-sum in return for the transfer of all rights and in perpetuity | |
| My moral rights were not respected | |
| Other | |
| None of the above | |

Your income

We would like to know about the average income you earned for your photographic activities. Please be reassured that this information will remain confidential to Europe Economics and the Institute for Information Law and can in no way be linked back to you. **Please answer the following questions with respect to your primary activity as indicated in your response to Q2.**

13) First, please indicate the currency in which you want to provide monetary figures.

| |
|-------------------------|
| Scroll-down menu |
| EUR |
| GBP |
| DKK |
| ... |

14) Now, consider the freelance work you have done as a visual artist over the last two years. For the purpose of this study we are interested in the earnings that you have generated in one of the following ways (i.e. not including photographs made under an employment contract):

- Earnings from commissioned work, i.e. work you did on behalf of a third party.
- Earnings you made from independently selling work you did at your own initiative.

What percentage of your average annual earnings over the last two years as a freelance visual artist were generated from commissioned work which you have done as a photographer?

| | |
|-------------------------|--|
| Scroll-down menu | |
| 0% | |
| Less than 10% | |
| 10%-20% | |
| 20%-30% | |
| ... | |
| 100% | |

15) [Only if Q14>0%] Please indicate, based on the past two years:

- average length of typical commissioned assignment (in number of days);
- what was the average fee per typical commissioned assignment (in terms of your chosen currency specified earlier); and
- approximate number of commissioned assignments each year.

| | Average length of commissioned assignment (number of days) | Average fee per typical commissioned assignment | Average number of assignments commissioned |
|------------------|---|--|---|
| Primary activity | | | |

16) [Only if Q14<100%] Consider now photographs that you have sold and that had not been previously commissioned by third parties. What were the average price and approximate number of such photographs that you sold each year over the last two years?

| | |
|--------------------------------------|--------------------------------------|
| Average amount per photograph | Average number of photographs |
|--------------------------------------|--------------------------------------|

| | |
|--|--|
| | |
|--|--|

17) Approximately how much have you received in additional payments for secondary uses of your photographs as an annual average over the last two years? (These additional payments include private copying or reprography levies, payments for broadcasting, or other secondary uses of your photographs). Please indicate if possible the amounts received from your collective management organisation and your clients/customers separately. For your clients/customers please provide your responses, if possible, with regards to the primary activity as indicated in your response to Q2. If this is not possible please simply indicate the total amount you have received and the approximate percentage related to your primary activity.

| | Amount related to primary activity |
|------------------------------------|------------------------------------|
| Collective management organisation | |
| Clients/customers | |

OR

| | Total amount | Approx. percentage related to primary activity |
|------------------------------------|--------------|--|
| Collective management organisation | | |
| Clients/customers | | |

18) What was the average annual income you received for both commissioned assignments and independent work over the last two years? Please respond with regards to your primary activity and in terms of your chosen currency specified earlier.

| |
|----------------------------|
| Please indicate the amount |
| |

DESIGNERS ONLY

19) Which of the following activities are you most frequently involved in as a designer? (Please tick those that apply).

| Scroll-down menu | | Main activity (select only one) |
|-------------------------------|--|---------------------------------|
| Product designer | | |
| Print media designer | | |
| Newspaper / magazine designer | | |
| Advertising designer | | |
| Web designer | | |
| Other | | |

20) In which country are you resident?

are you resident? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu | |
|------------------|--|
| Denmark | |
| France | |
| Germany | |

| | |
|-------------|--|
| Hungary | |
| Italy | |
| Lithuania | |
| Netherlands | |
| Poland | |
| Spain | |
| UK | |
| Other | |

21) How many years have you been working in the main activity indicated in your response to Q16? [RESTRICT TO ONLY ONE RESPONSE]

| |
|-------------------------|
| Scroll-down menu |
| Less than 1 year |
| Between 1 and 2 years |
| Between 2 and 3 years |
| Between 3 and 4 years |
| Between 4 and 5 years |
| Between 5 and 10 years |
| Between 10 and 20 years |
| More than 20 years |

22) How important to you is your income from your primary activity as indicated by your response to Q16? Please select one of the following. [RESTRICT TO ONLY ONE RESPONSE]

| | |
|--|--|
| Scroll down menu | |
| It is my only source of income | |
| It is not my only source of income but it is the primary one | |
| It is a secondary source of income | |
| I have no income from it | |

23) How do you carry out your primary activity as indicated by your response to Q16?

| | |
|--|--|
| As a freelancer | |
| Under an employment contract | |
| Both (it depends on the specific work) | |

IF 'UNDER AN EMPLOYMENT CONTRACT', ANSWER Q24 AND Q25 AND END DESIGNERS' SURVEY THERE, OTHERWISE CONTINUE TO Q26.

Your employment contract

24) Please indicate below with regard to your primary design activity? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small national private company/organisation (e.g. publishers, news agencies) | |
| Large national private company/organisation (e.g. publishers, news agencies) | |
| Small international private company/organisation (e.g. publishers, news agencies) | |

| | |
|---|--|
| Large international private company/organisation (e.g. publishers, news agencies) | |
| Public sector organisation | |
| Individual | |
| Other | |

25) With regard to your contract, did you experience any of the following?

| | |
|---|--|
| Scroll-down menu | |
| A contract claiming complete ownership of your work | |
| A contract claiming a broad license to use your work without limitation | |
| A contract claiming the right to use your work in other publications, but that allows you to receive payments for secondary uses | |
| A contract covering both digital and print publication (if appropriate) | |
| A contract that specifies the inclusion of your work in digital archives of the employer and thus may be accessible to other employees, the company network and/or the general public | |
| None of the above | |

Your freelance contract

26) Please indicate below who is your main client/the main purchaser of your work for your main activity (as indicated in your response to Q2)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small national private company/organisation (e.g. publishers, news agencies) | |
| Large national private company/organisation (e.g. publishers, news agencies) | |
| Small international private company/organisation (e.g. publishers, news agencies) | |
| Large international private company/organisation (e.g. publishers, news agencies) | |
| Public sector organisation | |
| Individual | |
| Other | |

27) In relation to the work you do for your main customer/ the main purchaser of your work, how do you negotiate your payment contracts (tick those options that apply)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|-------------------------|--|
| Scroll-down menu | |
|-------------------------|--|

| | |
|--|--|
| I used an agent | |
| I used another third party representative (e.g. a union) | |
| I negotiated myself because I had no other choice | |
| I negotiated myself because I believed I could achieve better conditions | |
| I accepted the conditions settled by the customer without negotiation | |
| None of the above | |

28) Which of the following best describe the type of contract generally used in your agreement?
[RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| A model contract provided by my trade association (union etc.) | |
| A standard contract provided by the party with whom I signed the contract | |
| A bespoke contract | |
| A contract based on a collective bargaining agreement which includes provisions on remuneration | |
| A contract based on a collective bargaining agreement which does not include provisions on remuneration | |
| No contract or only verbal contract | |
| None of the above | |

29) With respect to your contract, have you encountered any of the following problems?

| | |
|--|--|
| Answer | |
| There was no remuneration offered or included in my contract | |
| It was not clear how much remuneration I should receive for my work | |
| I did not receive the agreed remuneration | |
| I received no clear report on the royalties paid | |
| I could not verify the accuracy of the reporting on the sales of my work | |
| My work was published in a digital format without my knowledge and/or authorisation | |
| I tried to get my rights back but there was no legal possibility to terminate the contract or to opt-out | |
| I wanted to renegotiate the contract but there was no legal | |

| | |
|---|--|
| possibility. | |
| I had to accept a buy-out contract with a lump-sum in return for the transfer of all rights and in perpetuity | |
| My moral rights were not respected | |
| Other | |
| None of the above | |

Your income

We would like to know about the average income you earned for your design activities. Please be reassured that this information will remain confidential to Europe Economics and the Institute for Information Law and can in no way be linked back to you. **Please answer the following questions with respect to your primary activity.**

30) First, please indicate the currency in which you want to provide monetary figures.

| |
|-------------------------|
| Scroll-down menu |
| EUR |
| GBP |
| DKK |
| ... |

31) Now, consider the freelance work you have done as a visual artist over the last two years. For the purpose of this study we are interested in the earnings that you have generated in one of the following ways (i.e. not including designs made under an employment contract):

- Earnings from commissioned work, i.e. work you did on behalf of a third party.
- Earnings you made from independently selling work you did at your own initiative.

What percentage of your average annual earnings over the last two years as a freelance visual artist were generated from commissioned work which you have done as a designer?

| | |
|-------------------------|--|
| Scroll-down menu | |
| 0% | |
| Less than 10% | |
| 10%-20% | |
| 20%-30% | |
| ... | |
| 100% | |

32) [Only if Q31 > 0%] Please indicate, based on the past two years:

- a) average length of typical commissioned assignment (in number of days);
- b) what was the average fee per typical commissioned assignment (in terms of your chosen currency specified earlier); and
- c) approximate number of commissioned assignments each year.

| | Average length of commissioned assignment (number of days) | Average fee per typical commissioned assignment | Average number of assignments commissioned |
|------------------|---|--|---|
| Primary activity | | | |

- 33) **[Only if Q31<100%]** Consider now designs that you have sold and that had not been previously commissioned by third parties. What were the average price and approximate number of such designs that you sold each year over the last two years?

| Average amount per design | Average number of designs |
|----------------------------------|----------------------------------|
| | |

- 34) Approximately how much have you received in additional payments for secondary uses of your designs as an annual average over the last two years? (These additional payments include private copying or reprography levies, payments for broadcasting, or other secondary uses of your designs). Please indicate if possible the amounts received from your collective management organisation and your clients/customers separately. For your clients/customers please provide your responses, if possible, with regards to the primary activity. If this is not possible please simply indicate the total amount you have received and the approximate percentage related to your primary activity.

| | Amount related to primary activity |
|------------------------------------|---|
| Collective management organisation | |
| Clients/customers | |

OR

| | Total amount | Approx. percentage related to primary activity |
|------------------------------------|---------------------|---|
| Collective management organisation | | |
| Clients/customers | | |

- 35) What was the average annual income you received for both commissioned assignments and independent work over the last two years?

| |
|----------------------------|
| Please indicate the amount |
| |

ILLUSTRATORS ONLY

- 36) Which of the following activities are you most frequently involved in as an illustrator? (Please tick those that apply).

| Scroll-down menu | | Main activity (select only one) |
|----------------------------------|--|---------------------------------|
| Product illustrator | | |
| Print media illustrator | | |
| Newspaper / magazine illustrator | | |
| Advertising illustrator | | |
| Web illustrator | | |
| Other | | |

- 37) In which country are you resident? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu | |
|-------------------------|--|
| Denmark | |
| France | |
| Germany | |
| Hungary | |
| Italy | |
| Lithuania | |
| Netherlands | |
| Poland | |
| Spain | |
| UK | |
| Other | |

- 38) How many years have you been working in the main activity indicated in your response to Q30? [RESTRICT TO ONLY ONE RESPONSE]

| Scroll-down menu |
|-------------------------|
| Less than 1 year |
| Between 1 and 2 years |
| Between 2 and 3 years |
| Between 3 and 4 years |
| Between 4 and 5 years |
| Between 5 and 10 years |
| Between 10 and 20 years |
| More than 20 years |

- 39) How important to you is your income from your primary activity as indicated by your response to Q30? Please select one of the following. [RESTRICT TO ONLY ONE RESPONSE]

| Scroll down menu | |
|--|--|
| It is my only source of income | |
| It is not my only source of income but it is the primary one | |
| It is a secondary source of income | |
| I have no income from it | |

- 40) How do you carry out your primary activity as indicated by your response to Q30?

| | |
|--|--|
| As a freelancer | |
| Under an employment contract | |
| Both (it depends on the specific work) | |

IF 'UNDER AN EMPLOYMENT CONTRACT', ANSWER Q41 AND Q42 AND END ILLUSTRATORS' SURVEY THERE, OTHERWISE CONTINUE TO Q33.

Your employment contract

41) Please indicate below with regard to your primary illustration activity? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small national private company/organisation (e.g. publishers, news agencies) | |
| Large national private company/organisation (e.g. publishers, news agencies) | |
| Small international private company/organisation (e.g. publishers, news agencies) | |
| Large international private company/organisation (e.g. publishers, news agencies) | |
| Public sector organisation | |
| Individual | |
| Other | |

42) With regard to your contract, did you experience any of the following?

| | |
|---|--|
| Scroll-down menu | |
| A contract claiming complete ownership of your work | |
| A contract claiming a broad license to use your work without limitation | |
| A contract claiming the right to use your work in other publications, but that allows you to receive payments for secondary uses | |
| A contract covering both digital and print publication (if appropriate) | |
| A contract that specifies the inclusion of your work in digital archives of the employer and thus may be accessible to other employees, the company network and/or the general public | |
| None of the above | |

Your freelance contract

43) Please indicate below who is your main client/the main purchaser of your work for your main activity? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| Small national private company/organisation (e.g. publishers, news agencies) | |
| Large national private company/organisation (e.g. publishers, news agencies) | |
| Small international private company/organisation (e.g. publishers, news agencies) | |
| Large international private company/organisation (e.g. publishers, news agencies) | |
| Public sector organisation | |
| Individual | |
| Other | |

- 44) In relation to the work you do for your main customer/ the main purchaser of your work, how do you negotiate your payment contracts (tick those options that apply)? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| I used an agent | |
| I used another third party representative (e.g. a union) | |
| I negotiated myself because I had no other choice | |
| I negotiate myself because I believed I could achieve better conditions | |
| I accepted the conditions settled by the customer without negotiation | |
| None of the above | |

- 45) Which of the following best describe the type of contract generally used in your agreement? [RESTRICT TO ONLY ONE RESPONSE]

| | |
|---|--|
| Scroll-down menu | |
| A model contract provided by my trade association (union etc.) | |
| A standard contract provided by the party with whom I signed the contract | |
| A bespoke contract | |
| A contract based on a collective bargaining agreement which includes provisions on remuneration | |
| A contract based on a collective bargaining agreement which does not include provisions on remuneration | |

| | |
|-------------------------------------|--|
| No contract or only verbal contract | |
| None of the above | |

46) With respect to your contract, have you encountered any of the following problems?

| | |
|---|--|
| Answer | |
| There was no remuneration offered or included in my contract | |
| It was not clear how much remuneration I should receive for my work | |
| I did not receive the agreed remuneration | |
| I received no clear report on the royalties paid | |
| I could not verify the accuracy of the reporting on the sales of my work | |
| My work was published in a digital format without my knowledge and/or authorisation | |
| I tried to get my rights back but there was no legal possibility to terminate the contract or to opt-out | |
| I wanted to renegotiate the contract but there was no legal possibility. | |
| I had to accept a buy-out contract with a lump-sum in return for the transfer of all rights and in perpetuity | |
| My moral rights were not respected | |
| Other | |
| None of the above | |

Your income

We would like to know about the average income you earned for your illustration activities. Please be reassured that this information will remain confidential to Europe Economics and the Institute for Information Law and can in no way be linked back to you. **Please answer the following questions with respect to your primary activity.**

47) First, please indicate the currency in which you want to provide monetary figures.

| |
|-------------------------|
| Scroll-down menu |
| EUR |
| GBP |
| DKK |
| ... |

48) Now, consider the freelance work you have done as a visual artist over the last two years. For the purpose of this study we are interested in the earnings that you have generated in one of the following ways (i.e. not including illustrations made under an employment contract):

- Earnings from commissioned work, i.e. work you did on behalf of a third party.
- Earnings you made from independently selling work you did at your own initiative.

What percentage of your average annual earnings over the last two years as a freelance visual artist were generated from commissioned work which you have done as an illustrator?

| | |
|-------------------------|--|
| Scroll-down menu | |
| 0% | |
| Less than 10% | |
| 10%-20% | |
| 20%-30% | |
| ... | |
| 100% | |

49) **[Only if Q48>0%]** Please indicate, based on the past two years:

- average length of typical commissioned assignment (in number of days);
- what was the average fee per typical commissioned assignment (in terms of your chosen currency specified earlier); and
- approximate number of commissioned assignments each year.

| | Average length of commissioned assignment (number of days) | Average fee per typical commissioned assignment | Average number of assignments commissioned |
|------------------|---|--|---|
| Primary activity | | | |

50) **[Only if Q48<100%]** Consider now illustrations that you have sold and that had not been previously commissioned by third parties. What were the average price and approximate number of such illustrations that you sold each year over the last two years?

| Average amount per illustration | Average number of illustrations |
|--|--|
| | |

51) Approximately how much have you received in additional payments for secondary uses of your illustrations as an annual average over the last two years? (These additional payments include private copying or reprography levies, payments for broadcasting, or other secondary uses of your designs). Please indicate if possible the amounts received from your collective management organisation and your clients/customers separately. For your clients/customers please provide your responses, if possible, with regards to the primary activity. If this is not possible please simply indicate the total amount you have received and the approximate percentage related to your primary activity.

| | Amount related to primary activity |
|------------------------------------|---|
| Collective management organisation | |
| Clients/customers | |

OR

| | Total amount | Approx. percentage related to primary activity |
|------------------------------------|---------------------|---|
| Collective management organisation | | |
| Clients/customers | | |

52) What was the average annual income you received for both commissioned assignments and independent work over the last two years?

| |
|----------------------------|
| Please indicate the amount |
| |

Thank you for taking part in this research.

11 Appendix 3: Legal Questionnaire

11.1 Introduction

The following questionnaire aims to provide an overview of the legal and contractual approaches and mechanisms in your country ensuring the remuneration for specific authors as a result of the commercial exploitation of their works. The scope of this questionnaire comprises the following categories of right holders:

- authors of books, i.e. literary books, non-fiction and educational books;
- authors of scientific books and articles;
- journalists in the written press, i.e. newspapers and magazines;
- journalists in the audio-visual press, radio and television broadcasting;
- illustrators in the print sector, including digital versions of prints and online newspapers and magazines;
- designers in the print sector;
- photographers;
- translators in print, e.g. books, articles, (commercial) texts in general, official documents, etc.; and
- translators in audio-visual productions, e.g. involved in translation of dialogues for films/tv-series for dubbing, or subtitlers.

The questionnaire will start with questions on more general copyright and contract law and practice, followed by chapters on sector specific overviews, exercise of remuneration rights by CMOs, special copyright related issues and the role of competition law. When asked about the law, please consider copyright law, general contract law *and* case law.

The responses to this questionnaire will provide the legal and contractual foundation of the study commissioned by the European Commission (DG Internal Market and Services, Copyright Unit) on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works, led by Europe Economics and the University of Amsterdam.

Please note that all the contractual terms and conditions provided as part of this questionnaire are confidential and will be treated as such.

Ownership of rights & general rules on transfer (based on general contract or copyright law, as applicable)

Initial ownership, rights granted, formal transfer requirements

- a. What rules on (initial) ownership does the law provide for? Also include e.g. rules related to collective/joint works, works made in employment and commissioned works. Who is commonly designated as the initial owner in contractual practice?
- b. Which exclusive rights are specifically granted to authors, what is the legal mechanism for the transfer thereof (e.g. assignment, license or waiver) and is the assignment exclusive? Are there any formal requirements for the transfer of rights?
- c. Which remuneration rights are granted to authors and what form do they take? Is their existence subject to a condition (e.g. transfer of an exclusive right)? Which rights are to

be exercised collectively according to law (e.g. through a CMO)? To which extent are they waivable or assignable? Which party is responsible for the payment?

- d. Does your (copyright) law provide for moral rights to authors and, if yes, which rights are distinguished? Are they waivable or assignable?

General rules on transfer: scope, duration, type of remuneration, interpretation, future works/exploitation modes, causes for termination

- a. Are there rules on the scope of transfer of rights? Are there any legal rules concerning the interpretation of contracts transferring copyrights? Is the scope limited by duration, are their limitations to the transfer of future work, exploitation modes or right?
- b. In copyright law or contract law, are there causes for termination of contracts transferring rights?

Legislative developments

- a. Are there currently any debates in your country with regard to contractual practice and/or remuneration of authors?
- b. Are there any developments from the legislator to regulate the contractual practice or remuneration in this sector? Or are there other developments with regard to amending the copyright law that (might) affect the contractual position or remuneration of the authors covered in this study?

Sector-specific regulation and Contractual practice

Questions for each category of authors

The following questions are to be answered for each category of authors in section 0. Please answer them under each title. Furthermore, there might be additional questions specific to a category of authors.

Sector specific regulation

- a. Are there any specific regulations applicable to this sector in your country (e.g. special rules regarding transfer, remuneration, ownership of rights, statutory/mandatory licences, presumption of license/transfer etc.)? Any provisions protecting the (economic) weaker party in negotiations? Please explain.
- b. Is there any relevant case law in this field?

Contractual overview

- a. Which parties are involved in the contractual practice in the sector? Which parties are involved in the negotiations of authors' (model) contracts⁵²³ and what specifically is the role of trade associations and CRMOs in this?
- b. What are the contractual relationships between the author and the publisher/broadcaster/producer in this sector (e.g. are they usually freelancing, is there an employment relationship, combination or both, etc.)?
- c. Which rights are assigned/licensed in practice? Is there a general/global transfer/license of all rights or are different modes of exploitation specified in contracts? In particular, discuss the transfer of the **making available right**, and also more specifically the rights for **digital/online** exploitation and **exploitation on new (online) platforms**, such as Amazon.

⁵²³ Including general terms & conditions applying in the sector.

Are these rights usually covered by the rights transfer/license in contracts? Please refer explicitly to provisions in contracts and, if relevant, provide the literal clauses in your answer, preferably with a translation to English where necessary.

- d. How is the transfer/licensing of exclusive rights being remunerated and how is this remuneration negotiated/established and what is the role of collective bargaining in this? Is a separate royalty set for each mode of exploitation? Or a buy-out? Please elaborate in particular on – if any – distinctions that are made between online and offline exploitation (or similar distinctions).
- e. Do any contractual provisions exist regarding certain remuneration/compensation rights, such as for private copying, reprography, educational use etc.?
- f. How are moral rights dealt with in this sector? Are they commonly waived or assigned (either in whole or part)?
- g. In your opinion, does the contractual practice currently provide for adequate remuneration for authors and do you think that the negotiation process is fair?

Correspondence with law

- a. How does the above described contractual practice correspond with the law in your country? To what extent do contractual clauses deviate from or contravene legal provisions?
- b. Are there specific legal provisions against (market) failures in the contractual practice not already mentioned?

Authors of books (literary, non-fiction, educational)

- a. What is the role of self-publishing in your country? How is it facilitated by law and in contractual practice in your country? Which parties are involved (e.g. aggregators, agents etc.) and are there any rights transfer involved?

Authors of scientific books and journals

- a. What is the status of (publicly) funded research results? Do the common rules of publishing contracts apply or are there arrangements made in the law to accommodate open access policies? What is the contractual practice with regard to open access publishing in your country? Is it common practice and how does it relate to 'traditional' publishing? What is the role of funding organisations in this?
- b. To the extent not already mentioned above, what is the role of self-publishing in this? How is it facilitated by law/contractual practice in your country? Which parties are involved?

Journalists (written press: newspaper & magazines)

Journalists (audio-visual: television and radio)

Photographers

Illustrators

Designers

Translators (print/written)

Translators (audio-visual)

Remuneration rights and CRMOS

In answering this section, please discuss the question per remuneration right.

Representation by CRMOS

- a. Which remuneration rights are exercised by CRMOS? Which rights are exercised collectively on a statutory basis and which ones on a voluntary/contractual basis? Please provide the name of all relevant CRMOS and any relevant clauses from contracts between right holders and CRMOS.
- b. Are there any discussions in your country as to the representativeness of one of the CRMOS? For example, it may be a point of debate whether rights are effectively transferred to CRMOS to represent.
- c. What other parties are involved in the collection/distribution of remuneration? E.g., in some countries, certain organisation collect the money and distribute the money further among CRMOS, which subsequently distribute it among the right holders.

Establishment of tariffs (collecting side)

- a. What is the mechanism of the establishment of the tariffs? Is it set by law or parties in the sector? Which parties are involved in (the negotiations for) determining the fees? Are there advisory or similar bodies, either set by law or practice, involved? In addition, is there any case law regarding the establishment of remuneration fees?

Distribution of remuneration (distribution side)

- a. How is remuneration distributed among right holders? Does the law provide for any distribution formulas or is it determined by the CROMO and/or other parties and if yes, which parties are involved in this process? Do members/right holders of CRMOS have any influence?
- b. In your opinion, are remuneration and compensation rights effective in that they create a substantial (addition to the) income of authors? Please explain.

Alternative remuneration collection/distribution

- a. In case not already mentioned, please discuss here any alternative mechanisms in your country for the payment of remuneration. For example, remuneration could be negotiated and/or collected by CRMOS, but paid to the author through the publisher. Or any similar mechanisms?

Unfair clauses, corrective mechanisms, and obligations. *Please state the relevant sector(s)*

Publishing obligations & legal/contractual consequences; *Non usus*

- a. Do publishers have a legal obligation to publish and or is a contractual obligation to publish common in any of the sectors (either in (model) contracts or applicable general terms and conditions)?
- b. Do these obligations apply to specific modes of exploitation (e.g. only paper or both paper and digital etc.)?
- c. In practice, do authors often invoke this obligation? Is this obligation enforced by representative bodies?
- d. What are the legal and or contractual consequences when a publisher does not publish a work or does not exploit the work sufficiently (e.g. non usus clauses, termination of contract, reversion of rights transfer, etc.)? Also, discuss this question where no legal or contractual obligation to publish exists.

- e. Does a non usus or similar provision in the law exist outside the field of publishing? If yes, please elaborate on the importance of this provision in contractual practice.

Unfair clauses

- a. Are there types of clauses that are common in practice which are perceived (by authors) as being 'unfair' (e.g. global/general transfer of rights, buy-out clauses without any royalty arrangement, etc.) Do authors feel that they are imposed on them? Please explain.

Existence of best-seller clauses or similar corrective mechanisms

- a. Does the law contain any best-seller provision (i.e. obligation to revise the initial buy-out or royalty arrangement in case of an unexpected success which seems disproportional to the actual payment)? Does general contract law provide for any similar mechanisms (e.g. unforeseen circumstances doctrine, general concepts of reasonableness and fairness)? Please include relevant case law in this regard.
- b. Can such best-seller clauses or similar clauses be found in contractual practice? Or any other (similar) corrective mechanisms you like to mention here?

Fixed book prices

- a. Does the law provide for fixed book prices in your country? If yes, does it only apply to paper books, e-books or both?
- b. How does the mechanism work? Is the price itself fixed by law? Or who else sets the price in this system and which parties are involved or are of influence? Are there any negotiations? Are prices based on certain data or factors? Is (only) the retail price fixed, or are there other aspects in the supply chain fixed?
- c. If not fixed by law, do any contractual price fixing arrangement for books exist in your country? Do they apply to only paper books or e-books, or to both?⁵²⁴ And how does this mechanism work? Which parties are involved in these arrangements and negotiations? Are prices based on certain data or factors?
- d. How do fixed book prices affect the author in your country? Does it have any (known) impact on the income of the author?

Competition

Use of non-competition clause and legal status

- a. Are non-competition clauses used/common in any of the sectors? If yes, please specify the sector and the impact thereof on the author.
- b. How does this relate to the law? Are there any specific rules on the use of non-competition clauses (in certain sectors), or is there any case law on this subject or more general rules from competition law?

Collective bargaining and competition law. Influence of trade unions

- a. To what extent is collective bargaining of copyright contracts allowed/barred by competition law in your country?
- b. Does competition law provide for any exceptions for collective bargaining?

Sector specific regulation or case law regarding competition

- a. Is there a specific competition law/regulation applicable to one of the relevant sectors?

⁵²⁴ Maybe there could be an additional contractual price fixing for e-books in addition to a statutory fixed price regime for paper books.

- b. Do you think that any modification of competition law should be made in favour of collective bargaining of copyright contracts?

12 Appendix 4: Technical Appendix

12.1 Data manipulation

As noted in the main body of this report, the data on which our statistical and econometric analyses are based were obtained through an online, self-completion survey. While many questions were pre-coded such that the respondent need only select one of several possible alternative responses, it was necessary to allow respondents to insert their own numeric or text answers to some questions. Responses to the pre-coded and open-ended questions presented different challenges with respect to turning raw response data into consistent data that are suitable for analysis.

An important pre-coded question asked respondents to indicate their country of residence and currency in which they were being remunerated. Our analysis focuses on examining the effects on remuneration of the legal and collective bargaining frameworks across countries. We therefore had to remove observations in which the country of residence, or the form of the currency, were not specified by the respondent. In addition, an important question across author categories examined the negotiation process and, within the possible answers, authors had the chance to indicate whether an agent or a third-party representative was used. Similarly, another important question asked respondents to select their years of experience in their primary activity from a set of different possible ranges. To allow these data to be analysed, we created dummy variables corresponding to each answer and then grouped the relevant ones so as to form two distinct explanatory variables for analysis. Specifically, our dummy variable corresponding to experience takes the value of one if the respondent has been involved in her primary activity for at least ten years (or has published at least ten books in the case of book authors). Similarly, our dummy variable related to the negotiation process takes the value of one if a respondent used an agent or a third-party representative.

Answers to the open-ended questions, one of which is our dependent remuneration variable corresponding to total annual income from primary activity (or total income from latest publication for book authors), presented several inconsistencies both across different respondents and within individual responses. For example, some respondents appeared to earn an unusually high remuneration, relative to their peers, while some other respondents reported negative income. It was therefore rendered necessary to clean the data in order to remove such outliers that could affect the validity of our results and derived conclusions. Moreover, before analysing these data, it was necessary to adjust the national currency income variables in order to account for exchange rates and to reflect the fact that the purchasing power of a euro differs between countries. To transform the income variables into a consistent unit of measurement we obtained Eurostat data on Purchasing Power Parities (PPP) and used these to convert the income variables into Purchasing Power Standard (PPS) terms.⁵²⁵

Our dependent income variable and our monetary explanatory variables were also transformed into natural logarithms such that the econometric analysis would have the flexibility to use

⁵²⁵ We chose the approach of PPP adjustment rather than an adjustment based on average earnings because much of the income earned by authors and is dependent on consumer spending. Authors are not typically salaried employees and so we consider average earnings to be less relevant than purchasing power.

whichever formulation of the variable was determined to be the most appropriate on the basis of diagnostic tests. Specifically, income is truncated at zero and often exhibits a positive skew. Transforming the relevant variables using natural logarithms allows us to alleviate such concerns and improve model fit. Natural logarithms also enable us to interpret marginal changes in the explanatory variables in terms of multiplicative (percentage) changes in the dependent variable.

Having made these adjustments, we had an estimate of the respondent's income from each of the key activities mentioned in the survey. These key activities were more granular than those that are the focus of this study as we considered that a more detailed breakdown would help respondents. For the purpose of analysis, however, it was necessary to group certain categories of respondents that are engaged in very similar activities as follows:

- book authors;
- scientific authors;
- visual artists (including photographers, designers and illustrators);
- audio-visual translators;
- literary translators;
- audio-visual journalists; and
- print journalists.

Due to data unavailability and poor representation of all of the examined countries, scientific authors and journalists (audio-visual and print) were excluded from the analysis of the remuneration determinants of each author category. Specifically, available data on scientific authors' income was very limited, thus confounding the validity of our results due to lack of variation in the dependent variable. Similarly, 88 per cent of all income responses of journalists came from the UK, Germany and Denmark. This is expected to negatively affect the robustness of any derived conclusions as the lack of country representativeness is highly likely to mislead the interpretation of the derived effects of the legal and collective bargaining indicators. Nevertheless, these observations were included in the pooled sample regressions, thus enhancing our estimation of the aggregate average effects.

12.2 Summary statistics of author-specific explanatory variables

In this section we present summary statistics for two key author-specific explanatory variables that were included in the econometric analysis. The latter consist of the use of an agent or a third-party representative and the author's experience. The inclusion of these variables in our estimated models is expected to increase their explanatory power and enhance our understanding of the remuneration determinants within the examined author categories.

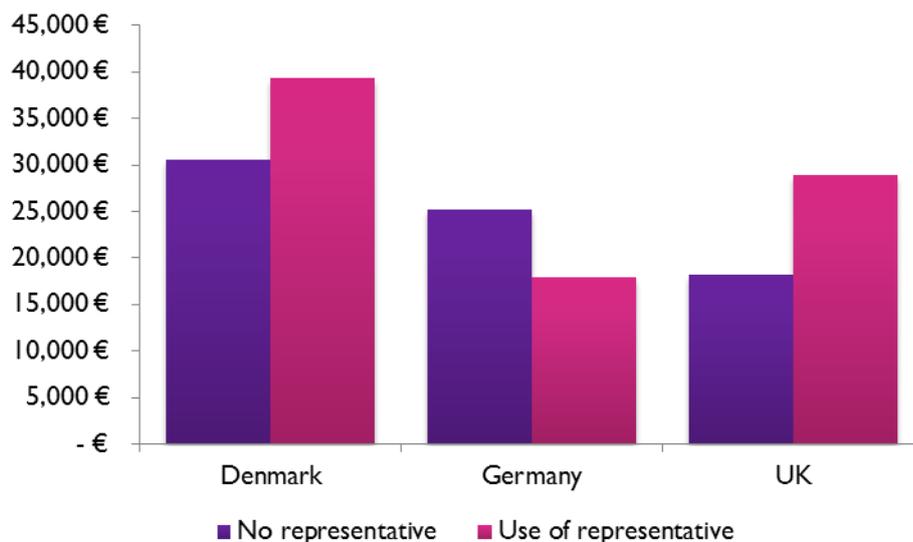
12.2.1 Negotiation agent

A common question across author categories examined whether authors used an agent or a third party representative during the negotiation process. We expect the use of a representative to improve the author's bargaining power during the negotiations, ultimately resulting in higher remuneration.

The following graph examines total annual income (for journalists, translators and visual artists) and the sum of advance, additional and CRMO payments for the latest publication of book authors. Specifically, the graph illustrates, for each country, the average income of authors who did not use a representative for their negotiations and the average income for the ones who used an agent or a third party representative. Countries are represented only if they have more

than 10 responses for both categories (use and non-use of a representative or agent). Only Denmark, Germany and the UK have a sufficient number of responses to be displayed. Though difficult to extract meaningful conclusions, the use of a representative appears to result in higher remuneration in Denmark and the UK. On the other hand, in Germany, the opposite effect is observed. Moreover, the obtained averages for the UK are based on more than 100 observations, thus leading us to conclude that the observed country-specific trend is likely to be significant.

Figure 12.1: Average income of authors who used a representative and of authors who did not use a representative



Source: Surveys of visual artists, translators, journalists and authors of books.

Note: For authors who used a representative this graph is based on 14 responses from Denmark, 23 from Germany and 119 from the UK. For authors who did not use a representative this graph is based on 100 responses from Denmark, 508 from Germany and 256 from the UK.

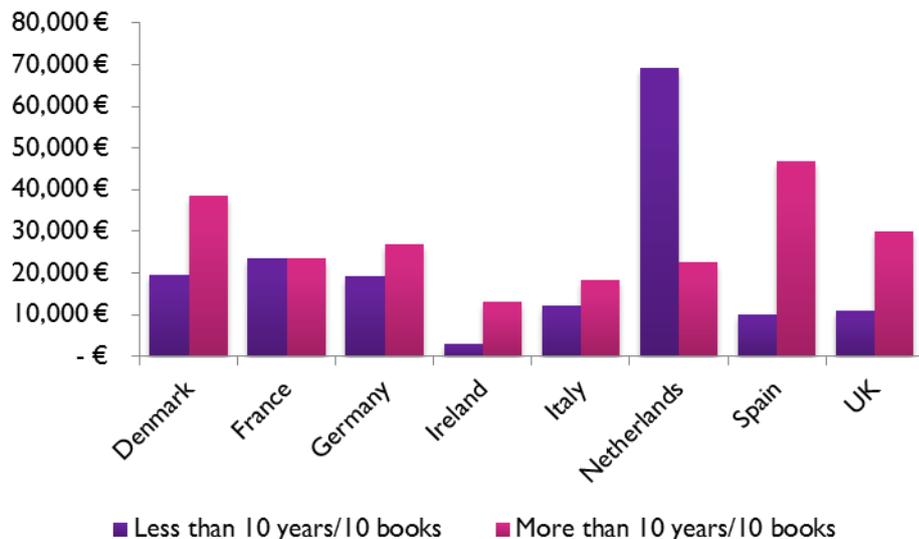
12.2.2 Experience in the industry

One of the survey questions asked respondents to indicate their years of experience in their primary activity. As it emerges from the analytical approach, we would expect experience in the industry to positively affect the author's bargaining power as well as indicate an increased likelihood of success of their work. The above are expected to result in higher remuneration for the experienced respondents, relative to the less experienced ones.

The graph below compares the average incomes of authors with more than 10 years of experience in the industry (in the case of authors of books we consider experienced authors the ones who published more than 10 books) to the incomes of those with less experience in the industry. Hungary and Poland are not displayed, as they do not have a sufficient number of responses.

Consistent with our expectations from the analytical framework, the average levels of income are higher for experienced authors, relative to less experienced ones, for all countries apart from the Netherlands. As in the previous case, the case of Netherlands is difficult to analyse, as averages are particularly affected by some pronounced outliers. While this interpretation appears intuitive, there might be other factors in play that may be affecting income within our sample, thus necessitating the introduction of more robust multivariate approaches, such as regressions, in order to account for such external factors.

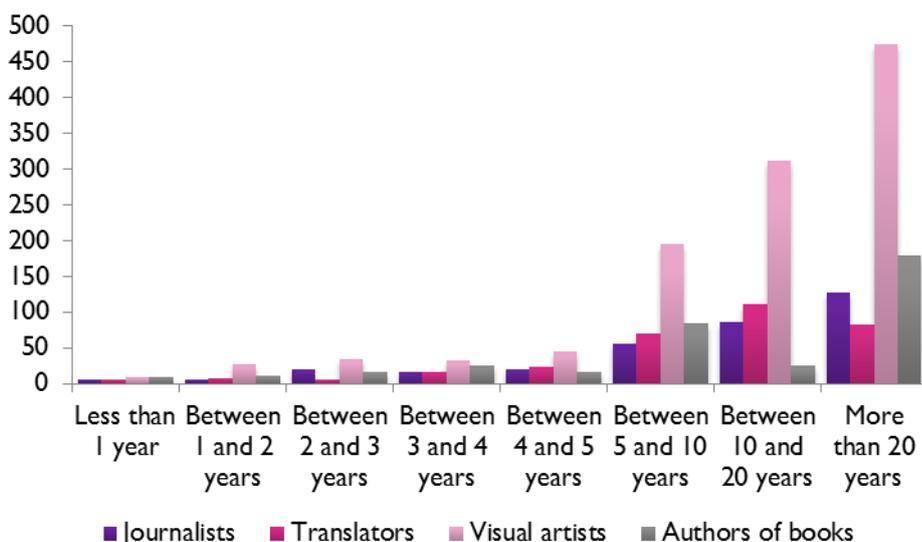
Figure 12.2: Average income of authors with more than 10 years of experience (or 10 books published) against average income of authors with less than 10 years of experience



Source: Surveys of visual artists, translators, journalists and authors of books.

Note: For experienced authors, this graph is based on 73 responses from Denmark, 102 from France, 389 from Germany, 16 from Ireland, 11 from Italy, 105 from the Netherlands, 27 from Spain and 207 from the UK. For non-experienced authors, this graph is based on 41 responses from Denmark, 44 from France, 143 from Germany, 13 from Ireland, 11 from Italy, 40 from the Netherlands, 29 from Spain and 201 from the UK.

The graph below shows the number of responses by years of experience in the industry for authors of books, translators, visual artists and journalists. The ranges presented correspond to those that respondents could choose in the survey. It clearly emerges from the graph that the vast majority of respondents for all the categories corresponds to authors with more than 10 years of experience in the industry. Most visual artists, authors of books and journalists have more than 20 years of experience in the industry. Most of translators have between 10 and 20 years of experience. There is also a significant number of respondents whose experience ranges between 5 and 10 years. Lastly, there is a negligible amount of respondents with less than 2 years of experience.

Figure 12.3: Number of responses by years of experience in the industry and by category

Source: Survey of authors of books, journalists, translators and visual artists

Note: Authors of books, differently from other categories, had the possibility to choose between 10 and 15 years and between 15 and 20 years. In order to be consistent with the other categories, the two figures are summed here in the category between 10 and 20 years.

12.3 Econometric models

12.3.1 Member state dummy variable models

Our intended approach to econometric modelling was to start from a relatively simple model and to explore the explanatory power of (more detailed) models including additional independent variables. To put this point more clearly, we began by exploring a model such as:

$$R_i = a + \beta MS_i + X'_i \gamma + \varepsilon_i$$

In this model, the dependent variable, R_i corresponds to our remuneration dependent variable, equal to total annual income for primary activity for visual artists, translators and journalists and total income from latest publication for book authors. As aforementioned, all monetary variables included in our models were adjusted using Eurostat data on Purchasing Power Parity (PPP) such that the monetary values employed in the models are in terms of Purchasing Power Standard (PPS).

The variable MS_i is a dummy variable identifying whether or not the individual is based in a particular Member State (nine such dummies were included in the models, while the tenth country would serve as the base case).⁵²⁶ The coefficient of this dummy variable measures the effect of differences in the legal framework between countries on levels of remuneration, but would also capture other country-specific effects. Therefore, this model does not allow inferences to be drawn on the extent to which the legal framework specifically affects remuneration levels (see below for models that allow for such inferences to be drawn).

⁵²⁶ 'Dummy variables' take a value of either zero or one. For example, a dummy variable indicating whether or not the individual is based in a certain country would take a value of one for all respondents that are from that country and zero for all other respondents.

The vector of variables \mathbf{X}'_i is a set of individual control variables based on responses to the survey. The selection of control variables was an element of the econometric analysis and so, at this point, we simply note that the candidate variables for inclusion in the model correspond to author- industry- and country-specific features. Given the nature of the dependent variable, the model would be estimated using ordinary least squares.

Unfortunately, the coverage and completeness of the survey data were insufficient to develop models of this type that would lead to meaningful results. Responses to our survey are generally concentrated in a few countries with a small number of responses within each category of author. This characteristic of the dataset means that the estimated coefficients on the Member State dummy variables would be subject to substantial margins of error and could potentially be highly misleading (e.g. if the small number of responses received from a given country were biased towards either very low earner or very high earners). For these reasons we have developed models which focus explicitly on the characteristics of national legal systems, pooling observations from different countries, while also including country dummy variables effects. The latter enable us to determine the effect of the legal and collective bargaining provisions more accurately, while also accounting for country-specific factors, unrelated to the legal and collective bargaining frameworks, that could affect remuneration.

12.3.2 Models that control for the characteristics of national legal systems

The model described above would, if estimated, help to identify whether, controlling for observable differences between individuals, the level of remuneration differs between Member States. Such a finding would be indicated by significant coefficients on the set of Member States dummy variables. The model would not, however, allow us to understand the extent to which these differences can be attributed to the legal framework, economic factors or other unobservable differences between countries.

To understand the extent to which economic and legal differences between countries are associated with differences in remuneration we added relevant control variables to the models. With respect to economic factors, these variables included indicators of the per-household expenditure on recreation and culture (in terms of PPS) and gross operating rate. With respect to legal factors, we developed an index of the overall strength of the legal framework and a separate index of the strength of collective bargaining agreements (see discussion above on how these indicators were constructed). Lastly, the aforementioned variables corresponding to the author's experience and the use of an agent or a third-party representative are also included in the estimations.

Specifically, we pooled all our observations across author categories and established a set of models that included two additional variables to account for legal strength and collective bargaining strength:

$$R_i = a + \mathbf{X}'_i\boldsymbol{\gamma} + \delta LS_i + \mu CB_i + \varepsilon_i$$

where R_i , and \mathbf{X}_i are defined as above, LS_i is the variable indicating the strength of the legal framework and CB_i is the variable indicating the strength of collective bargaining. While the 'strength' indicators do not capture the impact of specific legal factors on levels remuneration, they do provide the first clear indication of the impact of the legal framework as a whole.

Having explored the impact of the legal framework as a whole in the pooled sample regressions, we then developed the same models within samples corresponding to observations related to book authors, visual artists and translators, specifically. This allows us to further explore the effects of the legal and collective bargaining indicators within specific author categories.

Lastly, we developed models which included a set of dummy variables that indicate whether a particular feature of law, or collective bargaining agreement, is present in the legal system of the country in which the individual author or performer is located. Given the concerns about response coverage and completeness outlined above, we omitted the Member State dummy variables in these models in order to avoid multicollinearity concerns. These models focussed on the general features of copyright law, including provisions which were not deemed as significant by our legal analysis so as to be incorporated in the construction of our legal indicator. Accordingly dummy variables for one or more of the following provisions (as determined by our diagnostic tests) were constructed and included in the relevant estimations:

- formalities for the transfer of rights;
- rules on form of payment (proxying for adequate remuneration);
- limitation on scope;
- limitation on future forms;
- limitation on future works;
- "best seller" - type clause;
- model contracts; and
- active trade unions.

More precisely, this type of model took the form:

$$R_i = \alpha + X_i' \gamma + Z_i' \mu + \varepsilon_i$$

where R_i , and X_i are defined as above. The vector Z_i is a set of dummy variables that indicate whether a particular legal feature is applicable to the individual concerned.

The results of this class of models identify the extent to which the remuneration of the author or performer is associated with each economic and legal factor. For example, the results identify the extent to which the existence of formalities for the transfer of rights is associated with the level of remuneration of authors (a positive coefficient would indicate that remuneration is higher where such formalities exist). The individual control variables would again identify the extent to which remuneration is influenced by personal characteristics, experience and so on.

12.3.3 Model specification

Selection of dependent variable

The purpose of this study is to analyse the extent to which levels of remuneration are associated with different features of the legal and collective bargaining frameworks as distinct from other influences. Therefore, a variable measuring the level of remuneration of an individual author should be the dependent variable of our econometric models.

Responses to the survey allowed the selection of total annual income from primary activity as our dependent variable in both the pooled and individual author category estimations. For the special cases of book authors, total earnings from latest publication was selected as the dependent variable to be included in the pooled sample regressions. When estimating models solely within the book authors category the sum of advance, additional and CRMO payments was selected.

Selection of explanatory variables

As aforementioned, the key explanatory variables of interest in the pooled and individual author category regressions consist of our constructed legal and collective bargaining indicators. These are used in their continuous form as well as in the form of individual dummy variables representing the individual constituent provisions, which on aggregate form the indicators. There is limited variation in the dataset in respect of some general copyright law and hence it

has not been possible to include all variables in the models (because of multi-collinearity problems). The lack of variation in such cases derives partly from a degree of similarity across countries and partly from the fact that we sometimes have very few responses from countries that do not have a particular legal feature.

For example the limitation on the exploitation of future works variable is almost perfectly collinear with the variable which captures limitations on future forms of exploitation. This suggests that countries either have both of these limitations or neither. The latter suggest that it is not possible to separately identify the impact of each limitation on remuneration. In other cases, variables are not perfectly collinear but still suffer from collinearity since they can be expressed as a linear combination of other explanatory variables included in the model.

A set of other explanatory variables were also included in the estimations. With respect to economic factors, these variables included indicators of the per-household expenditure on recreation and culture (in terms of PPS) and gross operating rate. Moreover, the aforementioned variables corresponding to the author's experience and the use of an agent or a third-party representative are also included in the estimations. Lastly, when estimating models within the pooled sample, we also included dummy variables corresponding to each author category (with literary translators as the base case). Similarly, when estimating models within visual artists, dummy variables corresponding to photographers and designers were also included (with illustrators as the base case). This enables us to capture more accurately the effects of the legal and collective bargaining frameworks on remuneration, while also accounting for different author-specific dynamics influencing it.

12.4 Interpreting regression results

To interpret the regression results presented in the tables below, a little background knowledge of econometrics and statistics is required. In this section, we seek to provide the necessary knowledge to understand the discussion that follows.

The tables below consist of the following columns:

| <i>Variable</i> | <i>Coef.</i> |
|-----------------|--------------|
|-----------------|--------------|

The "Variable" column contains the explanatory variables of the regression model. Explanatory variables are those factors which we believe might have an impact on the level of remuneration per unit work.

The "Coef" column shows the impact of the explanatory variable on the level of remuneration. A positive value for the coefficient shows that an increase in the value of the variable increased the level of remuneration whilst a negative coefficient means that an increase in the value of the variable lowers the level of remuneration. The greater the magnitude of the coefficient, either positive or negative, the greater the impact on the level of remuneration.

In our models, the dependent variable is measured in logs. In these cases, the coefficient measures the percentage change in the value of the dependent variable for a unit increase in the value of the explanatory variable. For example, a coefficient of 0.2 on a numeric independent variable suggests that an one-unit increase in this variable leads to a 0.2 per cent increase in the level of remuneration, all else being equal.

It is important to note that not all variables have a statistically significant influence on the dependent variable, however. Statisticians and econometricians use significance tests to determine whether or not a particular explanatory variable has an impact on the dependent variable. In the tables of results, a single asterisk next to an entry in the "Coef" columns indicates that the coefficient is significantly different from zero at the 10 per cent level, whilst a

double asterisk indicates that it is significant at the five per cent level and a triple asterisk indicates that it is significant at the one per cent level. We have greater confidence that the dependent variable does truly impact on the dependent variable if it is significant at the one per cent level than we do if it is significant at the five per cent level.

Given the potential presence of heteroscedasticity,⁵²⁷ it should be noted that the standard errors on which our hypothesis tests are conducted are calculated using White heteroscedasticity-consistent standard errors and covariance.

Dummy variables

Some of the variables included in the regressions are 'dummy variables', which take a value of either zero or one. For example, a dummy variable indicating whether or not the individual is based in a country that has formalities for the transfer of rights would take a value of one for all respondents that are from such countries and zero for all other respondents. Dummy variables are indicated by a ~ symbol in the results tables below.

Interpreting the coefficients on dummy variables is slightly more complex than is the interpretation of the coefficients on standard logarithmic variables. The coefficient on a dummy variable indicates the change in the level of remuneration work given a change in the value of the dummy variable from zero to one. For example, a positive and significant coefficient on the "limitations on the scope for the transfer of rights" dummy variable in a regression examining the remuneration of book authors should be interpreted as follows:

Book authors from countries in which there are limitations on the scope of transfer of rights have higher remuneration compared to book authors from countries that do not have such limitations, all else being equal.

An added complication arises where dummy variables are used to indicate author category. In this case it is always necessary to omit one option from the regression and hence the coefficients on the other dummies are interpreted relative to the omitted option. Specifically, a positive and significant coefficient for a dummy variable corresponding to designers in a model within the visual artists sample that also includes a photographers dummy variable should be interpreted as follows:

relative to illustrators, designers earn a higher remuneration, all else being equal.

12.5 Model specifications

12.5.1 Models estimated within the pooled sample

In this section, our estimation results for the pooled sample regressions are presented. Initially, we estimate a model specification including the legal and collective bargaining indicators in their continuous form along with sector-specific variables and author category and country fixed effects. Table 12.1 reports the output of the first regression.

⁵²⁷ In statistics, a collection of random variables is heteroscedastic if there are sub-populations that have different variabilities from others. Variability could be quantified by the variance or any other measure of statistical dispersion. Regression analysis using heteroscedastic data still provides an unbiased estimate for the relationship between the predictor variable and the outcome, but standard errors and inferences obtained from data analysis are suspect.

Table 12.1: Pooled regression estimates (P1)

| Variable | Coef. |
|---------------------------------|-----------|
| Legal framework | |
| Legal indicator | 0.204** |
| Collective bargaining indicator | -0.003 |
| Author category | |
| Visual artist~ | 0.125 |
| Book authors~ | -3.951*** |
| AV translators~ | 0.547** |
| AV journalists~ | 0.274 |
| Print journalists~ | 0.114 |
| Other variables | |
| Cultural consumption | -0.038 |
| Gross operating rate | 2.498** |
| Constant | 8.679*** |
| Country effects | yes |

Note: Conventionally, p-values smaller than 0.10 (10 per cent) are taken as evidence that a regression coefficient is statistically different than zero. Specifically, p-values below 1 per cent indicate strong statistical significance, whereas p-values close to 10 per cent indicate relatively weaker statistical significance. In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 13.9 per cent; AIC: 4.22; BIC: 4.28; mean VIF: 2.97; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.529.

The insignificant effect of the collective bargaining indicator and the simultaneous significant effect of the legal indicator are suggestive of the likely function of collective bargaining as a proxy for the implied legal frameworks across countries. Specifically, in the following table we present the estimation output of a model including solely the constant and the collective bargaining indicator. It can be observed that the latter imposes a positive and highly significant effect.

Table 12.2: Pooled regression estimates (P1a)

| Variable | Coef. |
|---------------------------------|----------|
| Collective bargaining indicator | 0.294*** |
| Constant | 8.76*** |

Note: Conventionally, p-values smaller than 0.10 (10 per cent) are taken as evidence that a regression coefficient is statistically different than zero. Specifically, p-values below 1 per cent indicate strong statistical significance, whereas p-values close to 10 per cent indicate relatively weaker statistical significance. In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 1.17 per cent; AIC: 4.37; BIC: 4.38 .

Nevertheless, as indicated in the following table, when the legal indicator is included to the same model specification, the effect of collective bargaining is rendered insignificant while the effect of the legal indicator is positive and highly significant.

Table 12.3: Pooled regression estimates (P1b)

| Variable | Coef. |
|---------------------------------|----------|
| Legal indicator | 0.299*** |
| Collective bargaining indicator | 0.091 |
| Constant | 8.538*** |

Note: Conventionally, p-values smaller than 0.10 (10 per cent) are taken as evidence that a regression coefficient is statistically different than zero. Specifically, p-values below 1 per cent indicate strong statistical significance, whereas p-values close to 10 per cent indicate relatively weaker statistical significance. In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical

significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 2.84 per cent; AIC: 4.35; BIC: 4 .37.

As the legal provisions across countries cover a wide array of practices it is not always feasible to establish direct associations between the legal and collective bargaining frameworks. One point of view is that more protective legal frameworks (i.e. higher value of the legal indicator) appear to have an emphasis on collective bargaining arrangements (as reflected by the collective bargaining indicator). Accordingly, the correlation coefficient between the two indicators is positive and equal to 53%.

In order to further investigate the impact of collective bargaining on remuneration, we examined whether the individual constituent provisions of the indicator impose a significant effect. Specifically, in the following table, the effects of the existence of model contracts and active trade unions are illustrated.

Table 12.4: Pooled regression estimates (P2)

| Variable | Coef. |
|------------------------|--------------|
| Legal framework | |
| Legal indicator | 0.176* |
| Model contracts~ | -0.084 |
| Active trade unions~ | -0.351 |
| Author category | |
| Visual artist~ | 0.163 |
| Book authors~ | -4.009*** |
| AV translators~ | 0.705*** |
| AV journalists~ | 0.305 |
| Print journalists~ | 0.099 |
| Other variables | |
| Cultural consumption | 0.165 |
| Constant | 7.864*** |
| Country effects | yes |

Note: Conventionally, p-values smaller than 0.10 (10 per cent) are taken as evidence that a regression coefficient is statistically different than zero. Specifically, p-values below 1 per cent indicate strong statistical significance, whereas p-values close to 10 per cent indicate relatively weaker statistical significance. In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 15.2 per cent; AIC: 4.23; BIC: 4.28; mean VIF: 2.68; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.143.

12.5.2 Models estimated within samples for distinct author categories

The following regression outputs correspond to model specifications estimated within each individual author category. Initially, a model containing the two indicators in their continuous form is estimated. Subsequently, we substitute the collective bargaining indicator with dummy variables corresponding to model contracts and active trade unions. Lastly, we proceed to estimate model specifications including dummy variables for individual legal and collective bargaining constituent provisions.

Models estimated for book authors**Table 12.5: Estimations within book authors (BA1)**

| Variable | Coef. |
|---------------------------------|----------|
| Legal framework | |
| Legal indicator | 0.256 |
| Collective bargaining indicator | -0.081 |
| Experience~ | 1.536*** |
| Agent or representative~ | 0.773* |
| Cultural consumption | 0.533 |
| Constant | 2.659 |
| Country effects | yes |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 7.92 per cent; AIC: 5.24; BIC: 5.34; mean VIF: 3.53; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.673.

Table 12.6: Estimations within book authors (BA2)

| Variable | Coef. |
|--------------------------|-----------|
| Legal framework | |
| Legal indicator | 0.178 |
| Model contracts~ | 0.039 |
| Active trade unions~ | -2.300*** |
| Experience~ | 1.489*** |
| Agent or representative~ | 0.828* |
| Cultural consumption | 0.576** |
| Constant | 2.745* |
| Country effects | yes |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 8.22 per cent; AIC: 5.23; BIC: 5.32; mean VIF: 2.91; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.541.

Table 12.7: Estimations within book authors (BA3)

| Variable | Coef. |
|---|---------------|
| Legal framework | |
| Limitations on scope~ | 1.677** |
| Formalities for the transfer of rights~ | -0.487 |
| Rules on form of payment~ | -3.380 |
| Obligation to publish/non-usus~ | -0.569 |
| Limitations on future mode~ | Not included* |
| Limitations on future works~ | Not included* |
| Best-seller clause~ | Not included* |
| Model contracts~ | 0.893 |
| Active trade unions~ | -1.90** |
| Experience~ | 1.523*** |
| Agent or representative~ | 0.869* |
| Cultural consumption | 0.589** |
| Constant | 2.199 |

* These legal framework constituents were not included due to multicollinearity concerns.

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical

insignificance. Adjusted R-squared: 8.55 per cent; AIC: 5.23; BIC: 5.35; mean VIF: 4.00; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.805;

Models estimated for visual artists

Table 12.8: Estimations within visual artists (VA1)

| Variable | Coef. |
|---------------------------------|----------|
| Legal framework | |
| Legal indicator | 0.263* |
| Collective bargaining indicator | -0.177 |
| Visual artist type | |
| Photographers~ | 0.011 |
| Designers~ | 0.437** |
| Experience~ | 0.652*** |
| Agent or representative~ | -0.349 |
| Cultural consumption | 0.005 |
| Constant | 8.532*** |
| Country effects | yes |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 3.26 per cent; AIC: 4.13; BIC: 4.19; mean VIF: 2.23; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.476.

Table 12.9: Estimations within visual artists (VA2)

| Variable | Coef. |
|---------------------------|-----------|
| Legal framework | |
| Legal indicator | 0.239* |
| Model contracts~ | 0.514 |
| Active trade unions~ | -1.113*** |
| Visual artist type | |
| Photographers~ | 0.024 |
| Designers~ | 0.446** |
| Experience~ | 0.661*** |
| Agent or representative~ | -0.364 |
| Cultural consumption | 0.068 |
| Constant | 8.297*** |
| Country effects | yes |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 3.26 per cent; AIC: 4.13; BIC: 4.20; mean VIF: 3.37; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.456.

Table 12.10: Estimations within visual artists (VA3)

| Variable | Coef. |
|---|---------------|
| Legal framework | |
| Limitations on scope~ | 0.167 |
| Obligation to publish/non-usus~ | -0.197 |
| Rules on form of payment~ | 0.539* |
| Formalities for the transfer of rights~ | Not included* |
| Limitations on future mode~ | Not included* |
| Limitations on future works~ | Not included* |
| Best-seller clause~ | Not included* |
| Model contracts~ | -0.304 |
| Active trade unions~ | -0.819** |
| Experience~ | 0.656*** |
| Agent or representative~ | -0.339 |
| Cultural consumption | 0.071 |
| Constant | 8.966*** |

* These legal framework constituents were not included due to multicollinearity concerns.

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 2.69 per cent; AIC: 4.13; BIC: 4.18; mean VIF: 4.18; Prob (F-stat): 0.000; Ramsey RESET test Prob (F-stat): 0.1622.

Models estimated for audio-visual translators

Table 12.11: Estimations within audio-visual translators (AV1)

| Variable | Coef. |
|---------------------------------|----------|
| Legal framework | |
| Legal indicator | 0.013 |
| Collective bargaining indicator | -0.631** |
| Experience~ | 0.432*** |
| Agent or representative~ | 0.394 |
| Cultural consumption | 0.079 |
| Constant | 9.708*** |
| Country effects | yes |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 6.96 per cent; AIC: 3.53; BIC: 3.71; mean VIF: 5.74; Prob (F-stat): 0.043; Ramsey RESET test Prob (F-stat): 0.229 .

Table 12.12: Estimations within audio-visual translators (AV2)

| Variable | Coef. |
|--------------------------|---------------|
| Legal framework | |
| Legal indicator | 0.051 |
| Model contracts~ | 0.105 |
| Active trade unions~ | -1.289** |
| Experience~ | 0.459* |
| Agent or representative~ | 0.158 |
| Cultural consumption | Not included* |
| Constant | 9.314*** |
| Country effects | yes |

* Cultural consumption not included due to multicollinearity concerns.

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical

insignificance. Adjusted R-squared: 6.25 per cent; AIC: 3.54; BIC: 3.75; mean VIF: 3.40; Prob (F-stat): 0.067; Ramsey RESET test Prob (F-stat): 0.229.

Table 12.13: Estimations within audio-visual translators (AV3)

| Variable | Coef. |
|---|---------------|
| Legal framework | |
| Limitations on scope~ | 0.907* |
| Obligation to publish/non-usus~ | Not included* |
| Rules on form of payment~ | Not included* |
| Formalities for the transfer of rights~ | Not included* |
| Limitations on future mode~ | Not included* |
| Limitations on future works~ | Not included* |
| Best-seller clause~ | Not included* |
| Model contracts~ | Not included* |
| Active trade unions~ | -0.837* |
| Experience ~ | 0.536** |
| Agent or representative~ | 0.086 |
| Cultural consumption | 0.141 |
| Constant | 8.332*** |

* These legal framework constituents were not included due to multicollinearity concerns.

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: 5.10 per cent; AIC: 3.54; BIC: 3.69; mean VIF: 2.63; Prob (F-stat): 0.072; Ramsey RESET test Prob (F-stat): 0.8579.

Models estimated for literary translators

None of the tested econometric specifications generated any statistically significant results, as indicated by the overall explanatory power based on the F-test output.

Table 12.14: Estimations within literary translators (L1)

| Variable | Coef. |
|---------------------------------|---------------|
| Legal framework | |
| Legal indicator | -0.063 |
| Collective bargaining indicator | 0.198 |
| Experience~ | -0.571 |
| Agent or representative~ | 0.697 |
| Cultural consumption | Not included* |
| Constant | 9.533*** |
| Country effects | yes |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: -2.08 per cent; AIC: 3.96; BIC: 4.14; mean VIF: 1.81; Prob (F-stat): 0.690; Ramsey RESET test Prob (F-stat): 0.001

Table 12.15: Estimations within literary translators (L2)

| Variable | Coef. |
|--------------------------|--------------|
| Legal framework | |
| Legal indicator | -0.251 |
| Model contracts~ | -1.955 |
| Active trade unions~ | 3.513 |
| Experience~ | -0.515 |
| Agent or representative~ | 0.789 |
| Cultural consumption | -1.194 |
| Constant | 18.179*** |
| Country effects | Yes |

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: -1 per cent; AIC: 3.95; BIC: 4.16; mean VIF: 5.28; Prob (F-stat): 0.577; Ramsey RESET test Prob (F-stat): 0.386

Table 12.16: Estimations within literary translators (L3)

| Variable | Coef. |
|---|---------------|
| Legal framework | |
| Limitations on scope~ | 0.631 |
| Obligation to publish/non-usus~ | -0.320 |
| Rules on form of payment~ | 0.089 |
| Formalities for the transfer of rights~ | Not included* |
| Limitations on future mode~ | Not included* |
| Limitations on future works~ | Not included* |
| Best-seller clause~ | Not included* |
| Model contracts~ | Not included* |
| Active trade unions~ | -0.088 |
| Experience~ | -0.518* |
| Agent or representative~ | 0.558* |
| Cultural consumption | Not included* |
| Constant | 9.223 *** |

* Cultural consumption and legal framework constituents were not included due to multicollinearity concerns.

Note: In the table, *** denotes statistical significance at the 1 per cent level, ** denotes statistical significance at the 5 per cent level. * denotes statistical significance at the 10 per cent level, whereas the absence of stars denotes statistical insignificance. Adjusted R-squared: -2 per cent; AIC: 3.96; BIC: 4.14; mean VIF: 2.16; Prob (F-stat): 0.769; Ramsey RESET test Prob (F-stat): 0.572.

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