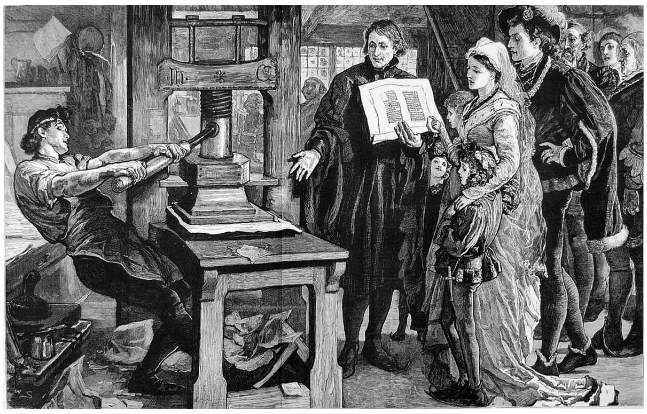
Monetising copyright in the book publishing industry

During the "**Lawfully Creative**" **podcast recorded with Joe DiMona**, Crefovi's founding and managing partner **Annabelle Gauberti** and Joe briefly discussed how hard it can be, for book authors such as Joe's late father, **Joseph DiMona**, to earn a steady income as professional authors. We also queried what the main income sources for book authors were, and how they could be maximised to avoid a "peaks and troughs" lifestyle, which has unfortunately come to be associated with a life dedicated to literary works and creativity. Here is Crefovi's take on income streams for authors and book publishers, in the publishing industry, and how to

maximise copyright in the book publishing industry.



1. Transfer of copyright in the book publishing industry

The first owner of copyright, in any literary work (i.e. a novel, a biography, a letter, an essay, some lyrics for a song, a film script) is the person who wrote it (leaving aside national legislation, such as the one in the United Kingdom ("**UK**"), which gives the employer the copyright in an employee's work created in the course of employment). Therefore, the first owner of copyright in the book publishing industry, is the author.

At the international level, copyright in literary works is recognised, and protected, by:

- the Berne convention for the protection of literary and artistic works (the "**Berne convention**"), and
- with regard to publishing in the digital environment, the World Intellectual Property Office ("**WIPO**") copyright treaty (the "**WIPO treaty**").

There are also some national laws, relating to the recognition, and protection, of copyright in literary works, such as:

- Section 3(1) of the UK Copyright designs and patents act 1988 ("**CDPA**"), which defines a literary work as being "*any work written, spoken or sung, other than a dramatic*

or musical work";

- Article L112-2 of the French Intellectual property code ("**IPC**") which provides that books, brochures and any other literary, artistic and scientific writings, are "*works from the mind*" ("*oeuvres de l'esprit*") and as such, protected by copyright ("*droits des auteurs*").

Therefore, the first owner of copyright has the exclusive right to do certain restricted acts in relation to his or her literary work, such as to:

- copy the work (known as the reproduction right);
- issue copies of the work to the public (known as the distribution right);
- rent or lend the work to the public (known as the rental and lending rights);
- perform, show or play the work in public (known as the public performance right);
- communicate the work to the public (known as the communication right), and
- make an adaptation of the work, or do any of the above acts in relation to an adaptation of the work (known as the adaptation right),

which, collectively, are referred to as primary copyright rights.

Moreover, the first owner of copyright has the right to make a commercial use of his or her literary work, by:

- importing copies;
- possessing copies;
- selling, exhibiting or distributing copies;
- dealing with items that are used for the making of

copies of the literary work, and
- permitting premises to be used for a performance, or providing apparatus for such performance, of the literary work,

which, collectively, are referred to as secondary copyright rights.

Finally, there are personal rights, called moral rights, conferred upon the author of primary copyright works, which are quite distinct from the economic interests in the literary work. There are four moral rights, as follows:

- **Right to paternity:** authors of literary works have the right to be identified as such, by requesting that their name be tied, or associated, with the work. In order to benefit, the author must assert his or her right.
- **Right to integrity:** this is the right for the author of literary works to object to the derogatory treatment of his or her work, that is, that the work has been added to, altered or deleted in such a way to amount to a distortion, mutilation or otherwise prejudicial treatment. In other words, that is the right to respect his or her creation.
- **Right to disclosure:** this is the right for the author to let go of his or her intellectual asset, which then goes from the private sphere to the public space. The author is the sole judge of the moment, and form, of the first communication to the public of his or her literary work.
- **Right to object to attribution:** any person has the right for literary works not to be incorrectly attributed to him or her. The attribution may be express, but it can also be implied. Also, the author may, after the publication of his or her literary work, decide to repent and withdraw from the attribution of this literary work. This provides the author with a

unilateral right to terminate his or her contractual obligations, and terminate any exploitation of his or her intellectual asset, provided that this author first indemnifies the publisher of the damages and consequences suffered by such publisher, upon termination of exploitation of his or her literary work.

While the moral rights cannot be transferred from the first owner of copyright of a literary work, to another person, the primary and secondary copyright rights can be transferred to a third party, either temporarily or permanently, as bundles of rights.

Usually, in the book publishing industry, the author/writer of a manuscript enters into a legal relationship with a publisher in order to publish the work and issue copies of it in sufficient quantities to satisfy the needs of the public.

The author does this by virtue of a contract in which it either assigns, or grants an exclusive or non-exclusive license, to the publisher. In the case of an assignment, the transfer of copyright is permanent and irreversible, while in the case of a license, the transfer of the copyright in the literary work will terminate, and revert back to the author, on a termination date set out in the license agreement.

The publishing agreement mainly grants the publisher primary copyrights, such as the rights of reproduction and distribution over a literary work, thus providing the publisher with the legal means necessary to publication.

However, the publishing agreement often also specifies how secondary and subsidiary rights are to be dealt with. The author may decide to grant the publisher the right to exploit his or her work in other ways, by selling translation rights, for example, or negotiating with a magazine or newspaper to serialize extracts from his or her work, or organising the digital and electronic exploitation of a printed work.

Sometimes, though, the author and/or his or her agent, will reserve these rights. In these cases, the agent of a successful and widely-known author may have very good contacts with TV and film companies and be better placed to negotiate options or deals directly with them. Or the agent and/or author may prefer to negotiate directly with the best players in the digital and electronic publishing space, rather than leaving an unsophisticated publisher of the print work do these negotiations or even exploit such digital rights.

Regulation of the contract between the author and publisher is left to national legislation (i.e. the Berne convention and the WIPO treaty do not apply with respect to contracts between authors and publishers). While in some legal traditions there are few, if any, rules on the form and content of that contractual relationship, other countries dispose of detailed legislation on the formalities of the publishing contract and its content, as well as the rights and obligations of the parties and the way the contract ends.

Indeed, on the one hand, the French IPC sets out several rules which narrowly explain what is allowed, and what is not allowed, in a French law-governed publishing agreement, since the French legislator has always the content creators' best interests at heart. These are articles L.131-1 to L136-4 IPC.

On the other hand, the UK CDPA is way more permissive, letting the parties fend for themselves when negotiating their contractual publishing arrangements, except for the obligation to have the license or assignment set out in a written agreement (section 90(3) CDPA) and that any license granted by the author is binding on every successor in title to his or her interest in the copyright (section 90(4) CDPA).

So, how do book authors get paid? And how much?

2. Work for hire payments

The simplest form of payment, of an author, is a fee paid in exchange for work completed – whether it is an article for a magazine, contributions to an encyclopaedia, or a short non-fiction title for children. These "work-for-hire" payments are not normally repeated. In other words, it is a one-off fee for a specific job.

This method almost always applies to artists and photographers providing illustrations (i.e. drawings, pictures) to accompany a publication.

Additionally, in a "work-for-hire" contractual relationship, copyright is often assigned to the publisher, and this transfer of copyright can be a condition of payment.

More specifically, many professional writers work to a standard range of payments based on the number of words, usually calculated per thousand. The sum per 1,000 words could be, for example, between Euros 200 and Euros 300, though much lower – and higher – figures are common, since the publisher may have to pay more if the writer is an expert in his or her field, or is required to do the work quickly because there is pressure on a deadline.

Some kinds of publishing projects almost always carry a fixed fee. For example, authors of non-fiction titles for school pupils or children are typically paid a fee for the whole job, and this includes help with finding illustrations or photographs, writing captions, producing a glossary and index, as well as researching and writing the book. Hence, a 32-pages 6,000-words book might earn a fee of Euros 2,500 (a little over Euros 300 per 1,000 words). Writing a film script also carries a fixed fee.

Usually, fees are paid once only. However, they can also be broken down into staged payments: for example, 25 percent paid

on signature of the publishing agreement, 50 percent when the publisher receives an acceptable manuscript and the outstanding 25 percent balance when the additional work (including checking proofs and layout) has been completed. This is cash in hand, paid regardless of how the book sells when it is published.

The writer, a "work-for-hire", will not normally be paid anything further, even if the title is translated into many different languages.

Consequently, the gross margin for reprints or translations can be substantially higher than the gross margin of the first print. This is because the writer's fee and other one-off costs do not recur in the reprint costs.

3. Royalties

However, for authors of full-scale works (i.e. novels, essays, poetry books or textbooks), the usual method is to pay a royalty.

Paying authors a royalty in the form of a percentage of sales revenue can favour publishers in two important ways:

- First, authors may identify more closely with the progress of their book and will therefore make a greater commitment to its success. Also, publishers may want to build a long-term relationship with their authors in the hope that they will write several books and build on the reputation of their earlier titles, and royalties can contribute to that sense of partnership.
- Second, paying authors as and when sales revenue is created can support cash flow.

This royalty takes the form of a "*pro-rata*" percentage based on actual sales of the book. Typically, a novelist may receive a share of the sales price, expressed as a percentage of the

local published, or retail, selling price for each copy sold.

Educational and scientific publishers, however, often pay royalties based on the net sums received (i.e. net receipts) by publishers after discounts to booksellers or retailers.

There is no such thing as a "normal" royalty rate, although many publishers use 10 percent as a reasonable benchmark.

Authors of consumer titles, particularly those whose agents negotiate the publishing contract, may demand that royalties are paid on the selling price of their book (i.e. "recommended retail price"). However, publishers will remind such authors and agents that some sales channels can only be serviced by way of very large discounts. For example, a chain bookstore that takes important quantities of a lead title, holding stock as well as promoting the book in-store, may demand large discounts. So if the publisher pays a 10 percent royalty based on a selling price of Euros 20, but is receiving only Euros 10 in sales revenues, then the Euros 2 payment such publisher is making to the author (10 percent of Euros 20) is, in effect, a 20 percent royalty on the sum received (20 percent of Euros 10). A compromise can be reached, by which the royalty rate is lowered if the discount exceeds a certain level. From a publisher's standpoint, paying authors on "net receipts" means that payments are kept more closely in line with the funds available from actual sales. However, authors reply back that their income should not be dependent on how big a discount the publisher has to make – they should be getting, as much as possible, the same amount on every copy of their book which is sold.

Royalty accounts for authors are prepared at an agreed time or at regular intervals, for example, every six months, and any payments due remitted after that.

These royalty payments may have some deductions made. For example, authors may have to pay for any of their own

corrections in the proofs that exceed 10 percent of the setting cost. This is partly to discourage them from making last minute changes to the set text (which is an expensive process for the publisher).

4. Advances

Publishers will consider paying authors an advance on this royalty, if such authors write for a living.

This money on account does two things:

- it is a statement of commitment from the publisher, and
- it supports the author to live and pay bills and living costs, while writing the book.

Many authors of educational, business and scientific books do not write for a living. The books, or contributions to publications such as journal articles, represent an important part of their reputations and career advancement, but their main source of income derives from their practice as teachers, researchers, lawyers. Consequently, publishers of books for these sectors seldom pay any advance to such authors.

An advance is not an additional fee. It is an up-front payment that has to be "earned out" (i.e. paid back) before further payments are made. Unearned advances will need to be written down, in the accounts, and will constitute a loss on the "Profit and loss" account.

It is considered wise to only pay an advance that amounts to less than half of that which would be paid in royalties, when the first printing has been sold. Therefore, an advance rarely exceeds half the amount that would have been earned in royalties from a complete sell-out of the first printing.

Advances are usually paid in stages: for example, 25 percent on signature of the head agreement, 25 percent on delivery of

an acceptable and publishable manuscript, and the outstanding 50 percent balance on publication. Authors (and/or their agents) will demand a larger share upfront, while publishers will try to keep their cash by paying the largest portion of the advance nearest to the date when revenue starts to come in to cover that advance. A compromise could be a division into equal shares – a third on signature, a third on acceptance of the manuscript, and a third on publication.

Large advances paid to celebrity authors can sometimes only be recouped if substantial additional income is derived from sales of film and TV options or serialization rights.

5. Additional income

Publishing contracts should specify what share of any additional and subsidiary income the author is going to receive.

This money may come from translation rights or sales of editions to publishers in another country.

Large lump sums may come from serialization rights sales to newspapers and magazines, or options on film, TV and broadcasting rights.

Substantial sums can also come from merchandising rights, based on sales of goods showing famous children’s characters or personalities.

Often, income derived from sales of subsidiary rights is shared between the publisher and author.

In other cases, the role of the publisher is solely limited to traditional publishing without further involvement in other forms of exploitation.

Money received as subsidiary rights income is remitted at the next accounting period, in addition to royalties owed to the

author, and is set against any remaining advance or any expenses the author may have incurred.

6. Monetising copyright in the digital environment

Dealt with above was the primary agreement between the author and publisher (sometimes called the "head contract"), through which the author grants the publisher a license, or assigns his or her rights, to reproduce and distribute a literary work in tangible form (in print or by means of digital copies contained in tangible carriers such as CD-roms).

However, making the manuscript into a print book, or even an e-book, is by no means the only way in which the potential in a manuscript can be exploited to the mutual financial benefit of author and publisher.

Depending on the nature of the literary work, the publisher can do much more to take full advantage of the intellectual property entrusted to him, than merely publish a book, especially in the digital economy we live in today. There are many ways of raising secondary income by exploiting the assets represented by the book.

Indeed, the potential may exist for the book to be serialized in a newspaper or magazine, digitized in whole or in part.

The rights that enable the publisher to exploit these, and other possibilities, are known as subsidiary rights, one of the most commonly used of which is the right to reprographic reproduction, or the making of a photocopy.

Crucially important in the digital era, are the electronic version/publishing rights because more and more print books are also published as e-books, and the mechanical reproduction rights (i.e. audio and video rights) because more and more print books are also published as audio books (even Spotify is

diversifying further outside music with audiobooks).

When the head contract is an assignment, the author assigns copyright to the publisher and therefore he or she transfers permanently over to the publisher the entire bundle of rights (subsidiary rights included), which the publisher is free to exploit, or not. Therefore, often, an assignment means the author receives no share of any subsidiary rights income. However, in some cases, the publisher will be obliged to pay the author his or her share of the financial rewards of such exploitation. The head agreement will then need to stipulate the proportion paid to the author, on the one hand, and to the publisher, on the other hand, with respect to this exploitation of subsidiary rights. For example, the split could be 50/50 and if so, the clause in the contract setting this out would be known as the "half profits clause".

When, however, the head agreement is an exclusive license, rather than an assignment, author and publisher are at liberty to negotiate the grant of rights – including the management of subsidiary rights. If the author authorises the publisher to exploit any or all of the subsidiary rights on his or her behalf, he or she will also determine in the contract the proportions in which the proceeds from the sale of these rights are to be divided.

7. Collective administration of copyright in the book publishing industry

To a large extent, the relationships in the book publishing industry are traditionally managed on an individual, or rather on a one-to-one basis, between the author and the publisher.

Yet, the increasingly widespread use of the photocopier has led to an explosion of the unauthorised reproduction of printed works.

As copying takes place everywhere and by everybody, it is a

massive use of intellectual property which, if unauthorised and unpaid, represents huge losses to right holders. However, seeking permissions for every individual act of copying is materially impossible.

Consequently, rights holders mandate organisations to manage their rights collectively. Such organisations issue licenses for the reproduction of literary works. These licenses permit copying only of extracts, and are not substitute for the purchase of a book. These organisations collect the fees and channel them back to the authors and publishers. In the case of literary works, such collecting societies are known as Reproduction Rights Organisations ("**RROs**").

RROs exist in some 50 countries around the world, and are linked by their umbrella organisation, the International federation of reproduction rights organisations ("**IFRRO**").

For example, the Copyright Licensing Agency Ltd ("**CLA**") and NLA Media Access Limited ("**NLA**") are the two UK RROs, while the "*Centre Français d'exploitation du droit de Copie*" ("**CFC**"), the "*Société des Editeurs et Auteurs de Musique*" ("**SEAM**") and the "*Société Française des Intérêts des Auteurs de l'Ecrit*" ("**SOFIA**") are the three French RROs.

Further links, indeed a network of rights and obligations, stem from the bilateral agreements that RROs conclude between each other so that, for example, when a license is granted in France for a work published in the UK, the French RRO transmits the fees collected to the UK RRO, which disburses them as royalties to UK right holders. And vice versa.

In a voluntary system, such as in the UK, the RRO gets its authority from the mandates of its participating rights holders, which means that its repertoire could be limited by the exclusion of non-participating publishers or authors. In this case, users would still need to apply directly to rights holders in respect of excluded works.

In other countries, such as in France, the national legislation supports collective management, and deals with the problem of non-represented rights holders by stipulating that, where an agreement is concluded, it covers the works of both represented and non-represented rights holders. This is an extended collective license, which creates compulsory collective management. The French RRO therefore collect royalties on behalf of participating and non-participating publishers and authors, and then distribute such royalties to all of them.

In certain countries, such as in France, a legal, or statutory, license, means that although rights holders cannot prohibit the use of their material (under limitations of private use), they have the right to be remunerated for that use. This regime is therefore based on the existence of a copyright limitation that allows reproduction for private use, which takes place in a private sphere, on a non-commercial scale and from a legitimate source. Remuneration may take the form of a fee negotiated by rights holders and users, or ir may be set by law. In some cases, the legislation finds an indirect way to generate remuneration, by imposing a levy on copying equipment.

Remuneration for reprography is part of the publishers' return on their investment and creates revenue streams that enable them to bring new products to the marketplace. Moreover, even when a book is out of print and a return no longer accrues to the publisher, or royalties to the author, revenue streams from licenses may continue to flow. This applies equally to back issues of journals, magazines, and backlists of book publishers.

Some RROs, such as the UK RROs NLA and CLA, and the French RRO CFC, have been mandated to manage reproduction in the digital environment. In this case, RROs need to be authorised to exercise this right on behalf of creative workers, when their mandate includes digital rights. It covers the transmission of

content over the internet.

Public performance rights (such as poetry readings) can also be managed by RROs. Some RROs are also authorised to administer mechanical reproduction rights such as the licensing of audio books. However, in France and the UK, such public performance rights and mechanical reproduction rights are not directly managed by French and UK RROs, so it is the respective syndication offices of French and UK publishers who deal with the management of those rights.

In France, CFC manages exclusively the royalties on reprography (both for photocopy and digital reproduction), on behalf of all French publishers, while SOFIA manages the royalties collected on the right to borrow and lend books, on behalf of all French authors and publishers.

In the UK, NLA manages the royalties on reprography rights, lending rights as well as the reproduction rights in the digital environment on behalf of its registered magazines and newspapers. CLA covers royalties on reprography rights, lending rights as well as reproduction rights in the digital environment, on behalf of its registered book publishers and certain registered magazines.

The future is bright for book authors and publishers who know how to make the most of their copyright, and we, at Crefovi, are here if you need a hand in maximising income streams from your portfolio of copyright and other intangible assets!

Crefovi regularly updates its social media channels, such as Linkedin, Twitter, Instagram, YouTube and Facebook. Check our latest news there!

Your name (required)

Your email (required)

Subject

Your message

Send