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## **EU draft directive for copyright in the digital single market**

### **Authors' Group Comments on EP CAMs - Draft compromise amendments on Chapter 3 (draft of 8 Jan 2018)**

#### **Fair remuneration in contracts of authors and performers**

The Authors' Group is Europe's leading Authors' network representing more than 500 000 authors, including writers, literary translators, composers, songwriters, journalists, photographers, film/TV directors and screenwriters in Europe. The Authors' Group consists of the following associations: European Composer and Songwriter Alliance (ECSA), European Federation of Journalists (EFJ), European Writers' Council (EWC), Federation of European Film Directors (FERA) and Federation of Screenwriters Europe (FSE).

The Authors' Group supports the European Commission's commitment to address problems related to the transfer of rights of authors to publishers, producers and broadcasters. The provisions set out in article 14, 15 and 16 and the accompanying recitals in the draft directive for copyright in the digital single market are very important first steps in this regard and the Authors' Group looks forward to working with Parliament and Council to improve the Commissions' proposals.

Here below are detailed comments of the Authors' Group and the EP working paper of 8 Jan 2018.

<p><b><u>Article -14a (new)</u></b>  <u>Draft compromise amendment replacing all relevant amendments, including:</u> AM 925 (Chrysogonos, Mastalka, Kuneva), AM 926 (Niebler, Ehler, Voss), AM 927 (Adinolfi et. al), AM 928 (Regner, Weidenholzer), AM 929 (Honeyball et. al), AM 930 (Guteland)</p>	
<p><i>Member States shall ensure that contracts with authors and performers provide for fair, proportionate and appropriate remuneration of the revenues derived from the exploitation of their works.</i></p> <p><i>Contracts shall specify the remuneration attached to each mode of exploitation.</i></p>	<p>The Authors' Group strongly recommends going back to the earlier version, which does not limit the principle for fair, proportionate and appropriate remuneration to contract.</p> <p>The Authors' Group welcomes the suggestion that contracts shall specify the remuneration attached to each mode of exploitation.</p>
<p><b><u>Article 14</u></b>  <u>Draft compromise amendment replacing all relevant amendments, including:</u> AM 877 (Maullu), 878 (Chrysogonos), 879 (Reda), 880 (Rohde), 881 (Voss), 882 (Honeyball et. al), 883 (Roziere et. al), 884 (Guoga), 885 (Niebler et. al), 886 (Guteland), 887 (Mastalka, Kuneva), 888 (Zwiefka, Brunon Wenta), 889 (Comodini Cachia), 890 (Adinolfi et. al), AM 891 (Svoboda), AM 892 (Regner, Weidenholzer), AM 893 (Feringer de Oedenberg et. al), AM 899 (Reda), AM 900 (Adinolfi et. al), AM 901 (Geringer de Oedenberg et. al), AM 902 (Honeyball et. al), AM 903 (Chrysogonos et. al), AM 904 (Svoboda), AM 905 (Radev), AM 906 (Guoga), AM 907 ((Niebler, Ehler, Voss), AM 909 (Geringer de Oedenberg et. al), AM 910 (Adinolfi et. al), AM 911 (Reda), AM 912 (Svoboda), AM 913 (Mastalka, Kuneva), AM 914 (Rohde), AM 915 (Guoga), AM 916 (Voss), AM 917 (Chrysogonos et. al), AM 918 (Honeyball et. al), AM 919 (Buda), AM 920 (Reda), AM 921 (Karim, Dzhambazki)</p>	

*Article 14*  
*Transparency obligation*

1. Member States shall ensure that authors and performers receive and taking into account the specificities of each sector, timely, ***accurate, relevant and comprehensive*** information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, ***including subsequent transferees or licencees***, notably as regards modes of exploitation, revenues generated, and remuneration due.
  - 1.a. ***Member States shall ensure that where the licensee of rights of authors and performers subsequently licenses those rights to another party, such party shall share relevant information with the licensor upon its request.***
2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure a high level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.
3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.
4. Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU ***or to agreements with collective management organisations***

The Authors Group opines that it is important to specify that the information must be provided at least once a year, preferable each trimester. Furthermore, the wording 'relevant' can be applied against authors' interests – who defines what is relevant? – the Authors Group therefore recommends deleting 'relevant'.

Finally, it is crucial that 'promotion' is included in the reporting. This is particular the case for literary authors and authors of music, where publishers disclose too little information as to what is done to promote authors. As the same article (and the corresponding recital) states that 'sector specificities must be taken into account' the Authors Group opines that 'promotion' can be excluded when not relevant for a specific sector (in the transposition of the directive).

The Authors Groups opines that the term 'significant contribution with regard to the overall work' does not convey any legal basis and potentially impose a very problematic qualitative criterion for works to meet copyright protection criteria, and thus come into conflict with international law. Therefore this paragraph must be deleted. Sufficient limitation is to the reporting obligation provided in 14.2

*or agreements with individual authors or performers, which are based on collective bargaining or equivalent provisions, where those agreements provide for comparable requirement resulting in a level of transparency that is equivalent to that referred to in paragraph 2*

### **Article 15**

Draft compromise amendment replacing all relevant amendments, including: AM 924 (Chrysogonos et. al), AM 925 (Chrysogonos et. al), AM 926 (Niebler, Ehler, Voss), AM 931 (de Grandes Pascual), AM 932 (Buda), AM 933 (Cavada et. al), AM 934 (Guoga), AM 935 (Chrysogonos et. al), AM 936 (Radev), AM 937 (Rohde), AM 938 (Karim), AM 939 (Roziere et. al) AM 940 (Honeyball), AM 941 (Adinolfi et. al), AM 942 (Guteland), 943 (Niebler, Ehler, Voss), AM 944 (Zwiefka, Brunon Wenta), AM 945 (Cofferati), AM 946 (Maullu), AM 947 (Regner, Weidenholzer)

*Article 15  
Contract adjustment mechanism*

Member States shall ensure that authors and performers *or any representative* acting on their behalf are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances *as a result of a change of circumstances that occurred during the exploitation of the contract.*

The Authors' Group strongly opposes to the addition '*as a result of a change of circumstances that occurred during the exploitation of the contracts*', which is contrary to the spirit of the entire article. Why should Parliament provide further protection to authors' contractual counterparties who already benefit from a stronger bargaining position, when the renegotiation can only be triggered when the exploitation revenue share to the author is « disproportionately low ». The Authors' Group fears this would weaken authors' possible claim to use the renegotiation mechanism, and could incentivize a wide-spread malpractice in the Cultural and Creative industries : the manipulation of the definition of costs, a "creative accountancy" practice which aims at reducing to the maximum the work's exploitation revenues.

**Article 16**

Draft compromise amendment replacing all relevant amendments, including: AM 962 (Mastalka et. al), AM 963 (Adinolfi et. al), AM 964 (Honeyball et. al), AM 965 (Dzhambazki), AM 967 (Chrysogonos et. al), AM 968 (Regner, Weidenholzer), AM 969 (Honeyball et. al), AM 970 (Guoga)

*Article 16  
Dispute resolution mechanism*

Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure. ***Member States shall ensure that representative organisations of authors and performers, including collective management organisations, may initiate such disputes at the request of one or more authors and performers.***

The Authors' Group does not recommend allowing 'collective management organisations' initiating article 16. In many instances collective management organisations represent both, authors and publishers/producers and would be in a clear conflict of interest when doing so. Furthermore, the Authors' Group opines that 'representative organisation' must have an explicit mandate from the author to act on their behalf and trigger article 16.

The Authors' Group strongly encourages the Parliament to introduce a rights reversion mechanism as a compliance tool for article 14. This is particularly the case for literary authors and authors of music. The mechanism should be applied if there is no compliance with Article 14 and if through the compliance with Article 14, it becomes evident that there is insufficient or lack of exploitation and promotion of the work.

*"Member States shall ensure that authors are entitled to a rights reversion mechanism to enable them to terminate a contract in case of insufficient exploitation and promotion, payment of the remuneration foreseen, as well as insufficient or lack of regular reporting."*

<p><b><i>(39a) The fair proportionate and equitable remuneration of authors and performers should be set as a general principle. This principle should not lead to the creation of an additional right, but be implemented through a transparency obligation, a contract adjustment mechanism and, a dispute resolution mechanism and a right of revocation. This would contribute to a protection of their work in accordance to the fundamental principle of EU-Law.</i></b></p>	<p>Whilst the Authors' Group welcomes the general principle of fair and proportionate remuneration it is at best uncertain whether this can be achieved solely with the propositions set forth in Articles 14 – 16, which are in many instances weakened in favour of the transferee rather than strengthened in the interest of the author. The Authors' Group therefore respectfully urges Parliament to amend said Articles according to views outlined in this document in order to ensure that the spirit and vision of the articles find their way also in practice.</p>
<p>Recital 42) Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, there should be a remuneration adjustment mechanism for cases where the remuneration originally agreed under a licence or a transfer of rights is disproportionately low compared to the <i>unanticipated</i> relevant revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive. The assessment of the situation should take account of the specific circumstances of each case as well as of the specificities and practices of the different content sectors <b><i>and include the nature, significance and contribution to the work of the author or performer.</i></b> Where the parties do not agree on the adjustment of the remuneration, the author or performer <b><i>or any representative appointed by them</i></b> should be entitled to bring a claim before a court or other competent authority.</p> <p>(43) Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism. <b><i>Representative organisations of authors and performers, including collective management</i></b></p>	<p>The Authors' Group does not support the addition of 'unanticipated' as the latter creates additional uncertainty with respect to the application and the spirit of said article. In addition, every publisher or producer will argue that the revenues were <i>anticipated</i> – which would kill the possibility for an author to claim additional remuneration in case the original remuneration is disproportionality low.</p>

*organisations, should be able to initiate such disputes on behalf of authors and performers.*