Society of Audiovisual Authors
Société des Auteurs Audiovisuels

SAA comments on the EC's proposal[1] for a Directive on Copyright in the Digital Single Market, 14 September 2016

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"*As the world goes digital, we also have to empower our artists and creators and protect their works. Artists and creators are our crown jewels. The creation of content is not a hobby. It is a profession. And it is part of our European culture. I want journalists, publishers and authors to be paid fairly for their work*[2]." These were the words of Jean-Claude Junker, President of the European Commission (EC) to the European Parliament (EP) on the day the second Copyright Package was presented.

this added to the statement from the EC communication of 19 December 2015[3] on "(*…) fair remuneration of authors and performers, who can be particularly affected by differences in bargaining power (…). Mechanisms which stakeholders raise in this context include the regulation of certain contractual practices, unwaivable remuneration rights, collective bargaining and collective management of rights*."

SAA therefore welcomes the EC proposal for a Directive on Copyright in the Digital Single Market, in particular its provisions on a transparency triangle in favour of authors (exploitation transparency, contract adjustment mechanism and alternative resolution mechanism) but believes that these provisions need some additions and amendments to ensure that they truly give effect to the intentions behind the proposed Directive.

In this context, SAA calls on the EP and Council to address the specific challenges of audiovisual authors in relation to the online use and dissemination of their works. Audiovisual authors need legal tools to empower them vis-à-vis exploiters of their works and ensure they receive equitable remuneration for the online use of their works across Europe.

SAA comments and proposals will therefore focus on:

- **Introducing an unwaivable right to remuneration for audiovisual works**
- **Improving the transparency triangle**
- **Making European audiovisual works available on VOD platforms**
- **Strengthening platforms' obligations in respect of copyright protected works**

On other aspects, SAA welcomes the EC approach to exceptions which proposes a limited intervention. We particularly welcome the possibility for Member States not to apply the exception of Art 4 (use of works in digital and cross-border teaching activities) when licences are available. We would like to highlight the importance of respecting solutions based on agreements between rightholders and users, in particular collective management agreements offering flexible licences to users and respecting the legal and economic preconditions necessary for the production of learning material. We would also prefer that fair compensation be mandatory rather than optional when the exception applies (Art 4.4), considering the importance of the educational market for many authors.

SAA also supports the provisions on out-of-commerce works and its extended collective licensing for cultural heritage institutions (Art 7). After the adoption of the Collective Rights Management Directive[4], such a proposal values collective rights management as a win-win

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[1] Proposal for a Directive on copyright in the Digital Single Market COM(2016) 593.
[2] State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends, Strasbourg 14 September 2016.
[3] Communication Towards a modern, more European copyright framework COM(2015) 626.
[4] Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

solution for both rightholders and cultural heritage institutions, ensuring remuneration for the former and legal certainty for the latter. SAA is pleased to see collective rights management perceived positively and encourages European institutions to apply this model to other uses, particularly remuneration for audiovisual authors for the online exploitation of their works.

1. INTRODUCING AN UNWAIVABLE RIGHT TO REMUNERATION FOR THE MAKING AVAILABLE OF AUDIOVISUAL WORKS

Audiovisual authors urgently need an EU legal basis for remuneration schemes providing them with income for the online exploitation of their works across Europe. These schemes sometimes exist at national level[5] but stop at the border, unless bilateral cooperation is possible. This situation highlights a serious dysfunction of the Internal market and can no longer continue in the Digital Single Market (DSM): authors cannot be left outside the copyright harmonisation process which aims at providing a high level of protection for rightholders. The DSM should be able to guarantee fair remuneration for the online exploitation of an author's work irrespective of the Member State in which the works are available. As a matter of principle, audiovisual authors, the creators and original rightholders of audiovisual works, should be entitled to equitable and proportionate remuneration for the ongoing exploitation of their works.

SAA calls for the introduction of an unwaivable and inalienable right to remuneration for audiovisual authors for their making available right, based on online distribution revenues and collected from the final distributors who make works available to the public[6]. This should exist when audiovisual authors transfer or license their exclusive rights to a producer. It would ensure a financial reward for audiovisual authors, proportional to the real exploitation of their works, without hindering or complicating the audiovisual exploitation chain[7].

Recognising this unwaivable right to remuneration in the context of digital exploitation is in perfect harmony with the political objectives of the revision of the Directive.

According to audiovisual authors themselves, the administration of this remuneration should be entrusted to collective management organisations (CMOs) in order to establish a direct revenue stream between the exploitation stage and the audiovisual authors. This is the only way to guarantee that the right to equitable remuneration will be enforced throughout Europe. Indeed, providing such a right without compulsory collective management would leave many European audiovisual authors behind, as they would not be able to enforce it individually.

The 2014/26/EU Directive on collective rights management, now implemented in many European countries, has defined rules of governance and transparency that can ensure sound and efficient management of the remuneration for authors.

A new Art 13b on this unwaivable right to remuneration should be introduced in a new Chapter 2a on the protection of audiovisual authors for the making available of their works:

Article 13b
Unwaivable right to remuneration

1. *Member States shall ensure that when an audiovisual author has transferred or assigned his making available right to a producer, that author shall retain the right to obtain an equitable remuneration.*
2. *This right to obtain an equitable remuneration for the making available of the author's work is inalienable and cannot be waived.*
3. *The administration of this right to obtain an equitable remuneration for the making available of the author's work shall be entrusted to collective management organisations representing audiovisual authors, unless other collective*

[5] In Spain, Italy, Poland, The Netherlands, Estonia, France and Belgium.
[6] See SAA white paper on audiovisual authors' rights and remuneration in Europe, 2nd edition 2015, endorsed by FERA and FSE.
[7] See SAA infographic on audiovisual authors' remuneration: challenges for fairness in the digital era.

agreements, including voluntary collective management agreements, guarantee such remuneration to audiovisual authors for their making available right.

4. *Authors' collective management organisations shall collect the equitable remuneration from audiovisual media services making audiovisual works available to the public.*

2. IMPROVING THE TRANSPARENCY TRIANGLE

SAA welcomes the EC's proposal for a transparency triangle with a) an exploitation transparency obligation, b) a contract adjustment mechanism and c) a dispute resolution mechanism. However, to ensure that these proposals have the intended effect and are not easily capable of being avoided, we believe that some amendments are essential.

a) Transparency obligation (Art 14)

The EC proposes that Member States ensure authors receive regular, adequate, sector specific exploitation information on their works (e.g. type of exploitation, revenues generated and remuneration due) from those to whom they have licensed or transferred their rights.

This information is due even if the contract does not provide for additional, exploitation-based remuneration. The aim is to provide authors with information about the uses of their rights so that they can judge whether or not to use the contract adjustment mechanism if they consider the agreed remuneration in the contract to be disproportionately low compared to subsequent revenues derived from the exploitation of the work.

SAA considers exploitation transparency to be essential. It is already included in some contracts, as a rule in some Member States and in the 2014/26/EU Directive on collective rights management, an obligation on CMOs towards rightholders to whom they attributed royalties or made payments (Art 18). It is therefore natural that those to whom authors have licensed or transferred their rights bear the same duty.

However, this provision raises some questions which need answering for the transparency obligation to deliver the expected results:

- **Accurate information**

The main challenge lies in achieving reliable reporting with clear and accurate information for authors. It is therefore important that Member States consult all relevant stakeholders to help determine sector-specific requirements (as requested in recital 41) and establish standard reporting statements and procedures for each sector. We understand that it is the justification behind the transitional period of one year provided for by Art 19.

In addition, we would like this reporting obligation to be accompanied by an audit right for authors when they believe the report is not accurate. This audit procedure could also be organised through the collective agreements which will establish the standard reporting statements and procedures.

Finally, the transparency obligation should be an incentive for audiovisual producers and distributors to make better use of digital technologies and ISAN, the international identifier of audiovisual works, to develop automated reporting statements for authors.

- **Obligation transferred**

In the audiovisual sector, the exploitation market is characterised by multiple sub-licensees who each exploit works on specific screens (cinema, TV, VOD, etc.) and territories. Rights in completed works are therefore sold frequently and it is virtually impossible for an author to keep track of who is in control at any one time.

Recital 40 specifies that the obligation is on the author's contractual counterpart or his successor in title. It is therefore vital to make sure that the obligation follows the work across all forms of exploitation, irrespective of who performs it and in which territory. It should therefore be further clarified in Recital 40 that the obligation is transferred with the rights. Such a clarification, which is particularly important for audiovisual authors, should be organised in

practice in the collective agreements which will define the standard reporting statements and procedures.

- **Possible derogations**

The possibility for Member States to adjust the obligation in those cases where the resulting "administrative burden" would be disproportionate in view of the revenues generated by the work is extremely worrying. This derogation is too general and would certainly lead to abuses. As the notion of proportionality is already stated in paragraph 2, SAA proposes the deletion of this specific derogation and to address any concrete situation in the sector-specific standard reporting statements and procedures at Member State level.

The same is true for the other possible derogation in paragraph 3 when the contribution of the author or performer is not significant. We would also suggest that this derogation be deleted and that concrete situations be addressed in the sector-specific standard reporting statements and procedures to be negotiated at national level.

Article 14
Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis and no less than once a year and taking into account the specificities of each sector, timely, adequate, accurate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, or their successors in title, notably as regards modes of exploitation, revenues generated and remuneration due.

2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure ~~an appropriate~~ high level of transparency in every sector, as well as a right of authors to audit. ~~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.~~ Member States shall ensure that the representative organisations of relevant stakeholders determine sector-specific standard reporting statements and procedures and foster automated processing making use of digital technologies and international identifiers of works.

4. Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU.

(40) (…) the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers. The reporting obligation shall be transferred with the rights and therefore follow the work across all forms of exploitation, irrespective of who exploits it and in which territory.

(41) When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered. Member States ~~should consult~~ shall ensure that the representative organisations of all relevant stakeholders ~~as that should help~~ determine sector-specific requirements and establish standard reporting statements and procedures for each sector, fostering automated processing making use of digital technologies and international identifiers of works. (…)

b) Contract adjustment mechanism (Art 15)

The EC proposes that authors should be entitled to claim additional remuneration reflecting the commercial success of their works when the agreed remuneration is disproportionately low compared to the revenues derived from the exploitation of the works.

Such a contract adjustment mechanism is based on the principle that copyright exists to secure authors equitable remuneration for the use of their works and that authors are therefore entitled to remuneration that is proportionate to the revenues derived from the exploitation of their works. This principle should be affirmed as a general EU principle in Article 15 and not just implicitly as a consequence of a contract adjustment mechanism.

The contract adjustment mechanism, in itself, faces two fundamental flaws: firstly, as we already said for the transparency obligation, rights in completed works and catalogues of works are frequently sold, production companies disappear, etc. so very often the company in control is no longer the production company with whom authors entered into the contract. It is therefore very important to clarify that authors can claim additional remuneration from the producer's successor in title if this happens.

Secondly, authors' careers are too unstable for authors to challenge their contracts in court, with the high cost of legal action and the risk of being black-listed as a consequence[8]. This is the reason why this legal tool which exists in a number of EU countries is, in practice, rarely used. The only way for this mechanism to be useful to authors is to allow representative organisations of authors to use it collectively, as is the case in the German Copyright Act. There needs to be a complementary obligation on Member States to conduct discussions per sector at national level between representative organisations of authors and similarly qualified associations of users to establish guidance on what constitutes equitable remuneration.

Article 15 should therefore be re-titled "remuneration for the use of works or performances" and complemented as follows:

Article 15
~~Contract adjustment mechanism~~
Remuneration for the use of works or performances

1. *Member States shall ensure that authors and performers are entitled to a proportionate remuneration of the revenues derived from the exploitation of their works.*
2. *Member States shall ensure that authors and performers are entitled to request additional, ~~appropriate~~ equitable remuneration from the party with whom they entered into a contract for the exploitation of the rights, or their successors in title, 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.*
3. *Member States shall ensure that representative organisations of authors and performers, whether collective management organisations, unions or guilds, and representative organisations of users, set standards for equitable and proportionate remuneration of authors and performers for the use of their works and performances, taking into account the specificities of each sector.*

c) Dispute resolution mechanism (Art 16)

The EC proposes that disputes concerning the transparency obligation and contract adjustment mechanism could be submitted to a voluntary, alternative dispute resolution procedure.

Mediation already exists in a number of Member States and can be useful to avoid court proceedings. However, individual authors may be as reluctant to refer to the alternative dispute mechanism, as they are to a court. It would therefore be useful to open the proceedings to representative organisations of authors, as is the case in the new Dutch Copyright Contract Act of 2015 (Art 25g).

[8] This situation has been identified in different studies commissioned by the European Parliament and Commission: CRIDS and KEA study on "Contractual arrangements applicable to creators: law and practice of selected Member States" (2014) and IViR and Europe Economics study on "the remuneration of authors and performers for the use of their works and the fixation of their performances in the music and audiovisual sectors" (2015).

Article 16
Dispute resolution mechanism

1. *Member States shall provide that disputes concerning the transparency obligation under Article 14 and the ~~contract adjustment mechanism~~ remuneration for the use of works or performances under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure.*

2. *Proceedings in respect of a dispute may also be brought on behalf of authors and performers by their representative organisations, whether collective management organisations, unions or guilds.*

3. MAKING AUDIOVISUAL WORKS AVAILABLE ON VOD PLATFORMS

Article 10 on the negotiation mechanism to help conclude agreements for the purpose of making audiovisual works available on video-on-demand platforms could be an interesting tool to help VOD platforms achieve their European works catalogue obligation under the proposed Art 13 of the amending Directive on Audiovisual Media Services[9]. It could also be an indicator of producers and distributors' efforts to make European works available on VOD platforms.

However, this tool would be even more interesting if it could be used by authors who are usually eager to have their works available on VOD platforms. This could be clarified in Recital 30:

> *(30) To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism allowing parties willing to conclude an agreement, including authors, to rely on the assistance of an impartial body. (…).*

To really increase the availability of works on VOD platforms, SAA proposes that the Directive enshrines an additional provision: an obligation of continuous exploitation of audiovisual and cinematographic works on such platforms, as proposed recently by Article 38 of the French bill on the Freedom of Creation, Architecture and Heritage, completed by a professional agreement concluded by representative organisations of all stakeholders on 11 October 2016, defining the procedures for implementing this obligation. Such an obligation of exploitation is also present in a number of other copyright laws where failure to sufficiently exploit the work may result in the rights reverting back to the authors[10].

SAA's proposal is that producers, and those to whom the rights have been transferred, should make their best efforts to continuously exploit audiovisual works and, in particular, make them available to the public on video-on-demand platforms. A new Article 9a should open Chapter 2 on Access and availability of audiovisual works on VOD platforms:

Article 9a
Exploitation of audiovisual works on video-on-demand platforms

1. *Member States shall ensure that producers and the transferees of the rights make their best efforts to make European audiovisual works available to the public on at least one video-on-demand platform.*

2. *Member States shall take appropriate measures to ensure the application of paragraph 1, including by encouraging the conclusion of professional agreements between representative organisations of authors, including their collective management organisations and representative organisations of producers and other stakeholders, as well as video-on-demand platforms, in a larger context of continuous exploitation of audiovisual works.*

[9] Proposal for a Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities COM(2016) 287/4.
[10] For example, Art 25e of the 2015 Dutch Copyright Act.

4. STRENGTHENING PLATFORMS' OBLIGATIONS IN RESPECT OF COPYRIGHT PROTECTED WORKS

SAA supports the EC proposal of Article 13 and Recitals 37 to 39 on the use of protected works by information society service providers storing and giving access to works uploaded by users. It addresses an important concern of the creative community that these service providers hide behind the liability exemption for hosting providers in Art 14 of 2000/31/EC Directive on e-Commerce to deny any responsibility in respect of copyright protected works.

The EC proposal clarifies the application of the right of communication to the public to user-uploaded-content services and the loss of their safe harbour status when they have an active role, for instance by optimising the presentation or promoting content. When these services store and provide access to large amounts of protected works, they shall cooperate with rightholders to ensure the functioning of licensing agreements or prevent the availability of works identified by rightholders through effective content recognition technologies (even if they have a passive role).

For more legal certainty, such a clarification of the application of the right of communication to the public to service providers storing and giving access to the public to protected works uploaded by users, and therefore the need for licensing agreements, should be enshrined in an Article. The first two paragraphs of Recital 38 should be moved to the body of the Directive into a new Art 13a for these provisions to have more impact.

Article 13a
Licensing agreements

1. *Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, therefore going beyond the mere provision of physical facilities and performing an act of communication to the public, as well as an act of reproduction, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.*

2. *In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works provided by the service or promoting such content, irrespective of the nature of the means used therefor, in which case the liability exemption does not apply.*

In addition, the last sentence of Recital 33 of the EC proposal for a Directive should be deleted as it may create confusion on hyperlinking:

> *33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. ~~This protection does not extend to acts of hyperlinking which do not constitute communication to the public.~~*