



COMMENTS ON THE PROPOSED DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET – **Version of 10 April 2017**

Proposed amendments: see page 6 of this document

I. GUARANTEEING THE FAIR REMUNERATION OF PERFORMERS FOR THE USE OF THEIR PERFORMANCES VIA ON DEMAND SERVICES

We are facing a crucial time in the protection of performers with the discussions to reform EU Copyright legislation and the adoption of the draft Directive on Copyright in the Digital Single Market on 14 September 2016.

The provisions in the draft Directive on the remuneration of authors and performers, with provisions on transparency, contract adjustment and dispute resolution, are a positive step forward. However, we believe these provisions do not go far enough. Both the Parliament and the Council need to take further steps to ensure that all performers can be fairly remunerated.

Legal on demand Internet streaming and download services, such as Spotify, Apple Music and Netflix are growing exponentially in popularity, revenue and value, but performers are missing out of their fair share in this value uplift.

If EU policy-makers really want to improve the situation of performers in Europe, addressing the contractual relationship between performers and producers is not enough.

The FAIR INTERNET coalition therefore calls for the introduction of **a right to remuneration for on demand uses paid by on-demand platforms (iTunes, Netflix, Spotify...)** and **subject to mandatory collective management** (see proposed new Article 13 bis on p.6 of this document).

II. IMPROVING THE CONTRACTUAL RELATIONSHIP BETWEEN PERFORMERS AND PRODUCERS (art. 14 – 16)

Articles 14-16 are an encouraging start, but there is room for significant improvement.

Articles 14-16 are currently so weak that nothing will change for most performers in Europe. The suggested provisions will not generate additional remuneration for them – as the title of the chapter wrongly suggests. These proposals completely disregard the value of performing artists' work and creativity.

Transparency in Article 14

Article 14 introduces a transparency obligation on the producers vis-à-vis performers to provide information on the revenues earned from the exploitation of their performances. Greater transparency will help performing artists ensure that income due from digital services is properly accounted to them. However, greater transparency in itself does not mitigate against agreements that are fundamentally unfair to performers.

We are concerned that Article 14, paragraph 2, removes all transparency obligations when the costs incurred are deemed "*disproportionate in view of the revenues generated*". A further limitation to the

scope of these obligations is added by paragraph 3, through a reference to the ‘significance’ of the artist’s contribution.

These limitations imply the benefit of article 14 is restricted to a minority of high profile performers who do not really need any such obligation on producers as they already have the right negotiation capacity in their contractual relationship. This language weakens the proposal.

The references to the “proportionality of the administrative burden” and the “significance of the contribution” should thus be removed.

In addition, transparency should be extended to all forms of exploitation of the recorded performances, including for instance advertising revenues and ‘golden handshakes’ (thus to include direct AND indirect revenues).

Contract adjustment mechanism in Article 15

The inclusion of the contract adjustment mechanism in Article 15 is positive. However, we feel it may prove useless in practice and not help those performers who are most in need.

Our concern is that relatively few performers would be in the position to file an individual claim against a producer, as it would put possible future engagements with that producer – and possibly others – at stake. Moreover, this would imply engaging in a lengthy and costly procedure.

One way to make such mechanism more efficient would be to allow performers to mandate a representative organisation like, for instance, a trade union or a collective management organisation, to file a claim on their behalf. One may however not conclude that the livelihood would necessarily be improved for such performers, given the uncertainty that is inherent in any such dispute. Furthermore, any contractual revision, where granted, would inevitably be limited to the performers bringing the case.

The reference to ‘relevant’ revenues opens the door to a broad range of interpretations, thus adding uncertainty to an already weak language.

Another thing to consider is to enable the re-negotiation of pre-digital deals where the introduction of a new format was not envisaged at the time of signing (e.g. downloading/streaming). The proposal for a new article would help clarify this [article 13 ter new in the annex].

Alternative dispute resolution in Article 16

While an alternative dispute resolution mechanism would be helpful, as per Article 16, we are concerned that the provision is far too weak. A mere voluntary procedure is not enough and most producers are unlikely to take part in a dispute resolution without a clear obligation to do so. There should therefore be an obligation for both contracting parties to take part in good faith in the dispute resolution procedure.

Articles 14-16, even if improved by Parliament, will not provide a sustainable option to all performers and will thus need to be complemented by a right to equitable remuneration for making available on-demand, which is vital for performers to receive fair remuneration from on-demand use, as is supposedly the intention of Chapter III.

III. DELETING ARTICLE 12 WHICH OPENS THE DOOR TO THE UNFAIR EXPROPRIATION OF REVENUES PAYABLE TO Rightholders

Article 12 of the proposed draft Copyright Directive effectively seeks to reverse the Court of Justice of the EU’s judgment in the Reprobel case by providing that: *“Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient*

*legal basis for the publisher to claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right*¹.

In accordance with Reprobel, the full amount of “fair compensation” relating to the reproduction of authors’ works under Articles 5(2)(a) and 5(2)(b) must only be paid to the authors of those works.

The FAIR INTERNET coalition is concerned that the proposed article 12 could set a negative precedent which could be harmful to the interests of performers, leading to an unfair expropriation of revenues due to them when they receive fair compensation.

The basis for benefiting from remuneration should always be a specific authors’ or neighbouring right granted to a category of rightholders, which is the case for example for the respective rights of performers and producers.

The principle of ‘unwaivable’ remuneration should not be undermined.

We therefore recommend that article 12 is simply deleted.

IV. THE VALUE GAP PROPOSAL MUST BENEFIT ALL PERFORMERS AS WELL AS PRODUCERS

The “value gap” concept addressed in article 13 is intended to benefit producers, but there is no guarantee, as things stand, that it will benefit performers. For the vast majority of them, the rights and revenues that article 13 attempts to protect are entirely in the hands of producers.

To be acceptable, article 13 should imperatively be complemented with the right to remuneration proposed in point 1 above (or see our first amendment below).

Without such right to remuneration, the value gap between most performers and their producers pertaining to the online exploitation of recorded performances has no chance to be redressed.

V. ADDRESSING THE IMBALANCED SITUATION BETWEEN PERFORMERS IN THE AUDIOVISUAL AND THE AUDIO SECTOR REGARDING TERM OF PROTECTION

In 2011, performers welcomed the adoption of the Term Directive (2011/77/EU amending Directive 2006/116/EC) which extended the term of protection for sound recordings in the EU from 50 to 70 years from the date that the recording was first published or communicated to the public.

Regrettably, the Directive does not answer all the needs of performing artists in Europe, as it only deals with audio recordings of their performances.

The extension of the term of protection granted to performers should not be limited to their sound recordings but should also cover their audiovisual fixations. No objective reasoning can justify that the latter be protected for a shorter period of time.

The 2011 Directive obliges the European Commission (under article 3(2)) to “*submit a report assessing the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector*” and “*if appropriate submit a proposal for the further amendment of Directive 2006/116/EC*” by January 2012.

As of 2017, the European Commission has still failed to do so and performers can no longer wait.

The FAIR INTERNET coalition therefore calls to address this unjustifiable imbalance by introducing an amendment to the current draft Directive extending the term of protection for audiovisual performances from 50 to 70 years.

¹ CJEU judgement in *Hewlett-Packard Belgium SPRL v Reprobel SCRL* C-572/13

VI. INTRODUCING AN INFORMATION OBLIGATION ON PRODUCERS FOR THE EFFICIENT ADMINISTRATION OF PERFORMERS' RIGHTS

A significant part of the administrative costs of performers' collective management organisations are directly linked to their struggle to identify all performers that should be remunerated for the exploitation of their performances. Measures are needed to improve the delivery of this essential information on a mandatory basis. This would be of great assistance to the efficient administration of performers' rights.

The 2014/26/EU Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market² addressed part of this issue by introducing in article 17 a user information obligation³.

Such obligation should equally apply to producers of sound and audiovisual recordings. Whilst users hold important information on the use of recordings, they cannot identify the performers involved who should be remunerated accordingly. Such information is however held by the producers who had a contractual relationship with the relevant performers for the corresponding recordings.

Such information, for the purpose of managing performers' rights, should be communicated to collective management organisations free of charge. In some countries, performers' organisations have to pay large amounts to access producers' databases. Such costs are unjustified and unreasonable.

A new amendment should therefore be inserted to this effect.

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN>

³ Article 17: "*Member States shall adopt provisions to ensure that users provide a collective management organisation, within an agreed or pre-established time and in an agreed or pre-established format, with such relevant information at their disposal on the use of the rights represented by the collective management organisation as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to rightholders. When deciding on the format for the provision of such information, collective management organisations and users shall take into account, as far as possible, voluntary industry standards*".

The FAIR INTERNET Coalition



The Association of European Performers' Organisations, AEPO-ARTIS, represents 36 European performers' collective management organisations from 26 countries, 23 of which are established in Member States of the EU. The other countries represented are Norway, Serbia and Switzerland.

In most countries performers' rights are collectively managed for both performers who are members and those who are not members of the collective management organisation. Thus globally, the number of performers represented by the 36 member organisations of AEPO-ARTIS can be estimated between 400.000 and 500.000.

Contact: Xavier Blanc and Nicole Schulze | +32 2 280 19 34 | aepo-artis@aepo-artis.org



The International Federation of Actors (FIA) represents performers' trade unions, guilds and professional associations in some 65 countries. In a connected world of content and entertainment, it stands for fair social, economic and moral rights for audiovisual performers working in all recorded media and live theatre.

Contact: Dominick Luquer | +32 2 235 08 65 | dluquer@fia-actors.com



The International Federation of Musicians (FIM) is an international non-governmental organisation representing musicians' trade unions, guilds and associations in about 65 countries covering all regions of the world, which enables it to speak for hundreds of thousands of musicians. In the European Union, the European group of FIM counts 26 musician trade unions from 21 EU Member States, working both in live performance and in the recorded media.

Contact: Benoît Machuel | +33 660 625 494 | benoit.machuel@fim-musicians.org



The IAO is the umbrella association for 10 national organisations representing the rights and interests of Featured Artists in the Music Industry. It is a growing coalition whose main goals are transparency, the protection of intellectual property and a fair reflection of the value an artist's work generates.

PROPOSED AMENDMENTS

Proposed new article 13 bis on the right of making available on demand (new)

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| | <p>Where a performer has transferred or assigned the exclusive right of making available on demand, and independent of any agreed terms for such transfer or assignment, the performer shall have the right to obtain an equitable remuneration to be paid by the user for the making available to the public of his fixed performance.</p> <p>The right of the performer to obtain an equitable remuneration for the making available to the public of his performance shall be unwaivable and collected and administered by a performers' collective management organisation.</p> |
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Proposed new article 13 ter on abusive clauses (new)

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| | <p>The transfer or licensing of exclusive economic rights in a given work or performance may not include or be deemed to include rights that do or did not exist at the time of the signature of the contractual arrangement.</p> <p>Neither may the scope of such transfer or licensing include or be deemed to have included territories, formats, modes of exploitation, technologies or any other aspect that do or did not exist at the time of the signature of the contractual arrangement.</p> |
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Proposed amendment to article 14

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| <p>1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.</p> | <p>1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient comprehensive information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards all modes of exploitation, the direct and indirect revenues generated and the remunerations due.</p> |
| <p>2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate 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,</p> | <p>2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate 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</p> |

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| provided that the obligation remains effective and ensures an appropriate level of transparency. | 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. | (deleted) |

Proposed amendment to article 15

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| Member States shall ensure that authors and performers 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. | Member States shall ensure that authors and performers are entitled to claim, individually or collectively, adequate contractual adjustments, 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 all forms of exploitation, direct or indirect, of the works or performances. Authors and performers may individually or collectively appoint a representative organisation to file such claim on their behalf. |
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Proposed amendment to article 16

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| 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 provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 shall be submitted to an voluntary, alternative dispute resolution procedure. The author's or the performer's contractual counterpart shall take part, in good faith, in the dispute resolution procedure. |
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Proposed amendment to article 12

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| Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right. | (deleted) |
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Proposed new article extending the duration of related rights:

Amending article 3 of the 2011/77/EU Directive

1. The rights of performers shall expire 70 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

3. The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term ‘film’ shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

Amending article 10 of the 2011/77/EU Directive

5. Article 3(1) and (3) in the version thereof in force on shall apply to fixations of performances and films in regard to which the performer and the producer of the first fixation of the film are still protected, by virtue of those provisions in the version thereof in force, as at and to fixations of performances and films which come into being after that date

Proposed new article 14a amending article 17 of the 2014/26/EU Directive

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| | <p>New paragraph 2</p> <p><i>“Member States shall provide that producers compulsorily communicate, free of charge, to collective management organisations for the purpose of effective administration of rights, complete and accurate information as is necessary in order to identify the use of the work or other subject matter and the corresponding rightholders”</i></p> |
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