



**COMMENTS TO AMENDMENTS TABLED TO THE DRAFT REPORT BY MEP COMODINI CACHIA
ON THE PROPOSED DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET**

10 July 2017

Dear Members of the EP Legal Affairs Committee,

The Fair Internet coalition welcomes the many amendments presented by this committee with a view to addressing the precariousness that performers and audiovisual authors endure on a daily basis and improving their livelihood.

In particular, we fully support the introduction of an unwaivable and non-transferrable right to equitable remuneration for on-demand uses, paid by online downloading or streaming platforms (e.g. iTunes, Netflix, Spotify, etc.) and, with respect to performers, subject to mandatory collective management.

This mechanism constitutes a fair, efficient and simple answer to the need for a modern and more balanced copyright, perfectly fitted to the Digital Single Market. It acknowledges the value of performers' and audiovisual authors' creative contribution and ensures that they are, at last, fairly rewarded for the use of their work in digital, on-demand networks.

As you surely know, the overwhelming majority of performers in Europe work under inequitable terms, whereby all their intellectual property exclusive rights are transferred to employers/engagers upfront, in return for a single payment. As a result, they do not receive any meaningful revenue, if at all, from the online exploitation of their exclusive right of making available.

Contrary to what audio or audiovisual producers like to claim, even though addressing the “value gap” (article 13) in whichever shape or form may allow the market to grow, it will not change the situation described above.

We therefore call upon the Legal Affairs Committee to resolutely endorse such a right to remuneration and build support with all political groups around a meaningful compromise.

We also call upon the Legal Affairs Committee to carefully address the unbalanced contractual relationship between performers (and audiovisual authors) and producers. Some amendments genuinely

seek to improve the very weak proposal by the European Commission. They include measures making transparency obligations benefit all performers equally; banning unfair clauses stretching out to encompass future rights, modes of exploitation, uses, etc.; encouraging sector-specific reporting standards or collective claims to a contractual revision.

Other amendments however would make things even worse than they are now and should thus be resolutely rejected.

We trust that the members of the EP Legal Affairs Committee will seize this once-in-a-lifetime opportunity to promote an equitable level playing field in our industries, enabling performers and audiovisual authors to finally envisage a better future.

**SUGGESTED COMPROMISE AMENDMENTS TO THE COPYRIGHT DIRECTIVE
AND OTHER JURI AMENDMENTS¹**

I. REMUNERATION OF PERFORMERS

WE SUPPORT AM. 471 Adinolfi et al.

	<p><i>Recital 41 a (new)</i> <i>(41 a) The creative drive is present in every human being, and needs to be nurtured, protected and stimulated in order to lay the foundations for the continuous renewal of creative talents. Therefore, the fundamental and prominent role of authors, creators and performers in the creative process and within society should be recognised. To this end, Member States should ensure that they are entitled to a fair and proportionate remuneration of the revenues derived from the exploitation of their works.</i></p>
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Justification

This essential amendment reaffirms the prime role of performers and other creators in society, as well as the need to ensure that they receive a fair remuneration for all forms of exploitation of their works or performances.

SUGGESTED COMPROMISE AMENDMENT drawing on AMs 868 Rozière et al, 870 Estaràs Ferragut, 874 Durand et al, 876 Cavada et al, 923 Honeyball et al, 925 Chrysogonos et al, 948 Maštálka et al.

	<p><i>Article 13 a (or alternatively Article 14 a)</i> <i>Unwaivable right to equitable remuneration</i> <i>Member states shall ensure that when an audiovisual author or a performer has transferred or assigned his exclusive right of making available on demand to a producer, and independent of any agreed terms for such transfer or assignment, that audiovisual author or performer shall have the right to obtain an equitable remuneration to be paid by users for the making available to the public of his/her work or fixed performance.</i> <i>The right of the audiovisual author or the performer to obtain an equitable remuneration for the making available to the public of his work or performance is inalienable and shall not be waived.</i> <i>The administration of this right to obtain an equitable remuneration for the making available of the performer's <u>fixed performance</u> and the audiovisual author's work shall be entrusted to a collective management organisation representing performers and/or audiovisual authors, unless, <u>in the case of audiovisual authors</u>, other collective agreements, including voluntary collective management agreements, guarantee such remuneration to them.</i></p>
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¹ Underlined text stands for changes that the signatories of this document deem essential, despite the fact that they have not yet been conveyed by formal amendments as yet.

Justification

Similar demands from performers and audiovisual authors may have created confusion and have given rise to amendments that either focus only on the needs of the former or on those of the latter. Those attempting to provide a synthesis of both have included elements of the audiovisual authors' requests that will not work for, or may even be prejudicial to, performers – this is especially the case with respect to an exception to mandatory collective management, which would not work at all for performers but that we understand may be preferable for some authors.

We are thus suggesting a compromise language that we hope will enable to unify all JURI members behind those amendments, whilst capturing the essence of the requests from both performers and audiovisual authors as well as their respective differences.

It is important to note that any possible exception to mandatory collective management would make it impossible for performers' collective management organisations to administer this right in practice. Contrary to authors, tens or even hundreds of performers may contribute to one audio or audiovisual work and thus collective management organisations should know, for each of them and on the basis of a global repertoire, whether their original contract included such remuneration and thus whether they may or may not collect and distribute equitable remuneration from online platforms on their behalf. Collecting societies do not have access to that information, as producers are under no obligation to provide it and in a language they can understand.

In the case of performers, collective agreements and collective management are two extremely different things and whilst the former may well rely on the latter for collection and distribution of union-negotiated rates, collective management (including voluntary collective management) cannot be considered to be a type of collective agreement. Collective agreements are negotiated by the trade unions with employer bodies. They typically define acceptable (and minimum) terms for the employment of performers. Depending on the bargaining clout of the negotiating union, they may also lay out minimum terms with respect to the transfer or assignment of performers' exclusive rights. In fact, very few of them do. Where this is the case, they may not provide for any remuneration for acts of making available on demand and only apply to productions carried out under the terms of those agreements.

The reference to "voluntary collective management agreements", at least from performers' standpoint, seems to improperly confuse collective management with the outcome of collective bargaining (i.e. a collective bargaining agreement). A "voluntary collective management agreement" corresponds to the situation where a rightholder has given a mandate to a collective management organisation to exercise his or her rights, including, in the present proposal, his/her exclusive right of making available on demand. This does not correspond to the reality that performers experience on a daily basis as they transfer all their exclusive rights to producers, mostly on a buy-out basis if they want to work. In the audiovisual sector, this practice is often encouraged by legal provisions establishing a presumption of transfer to the sole benefit of producers. Once the exclusive right of making available on demand has been transferred, it is impossible for performers to envisage a "voluntary collective management agreement". An exclusive right transferred to the producer can no longer be collectively managed.

The inclusion of an equitable remuneration right in the acquis will not prejudice collective agreements, in the few countries where they exist. These arrangements would rather be complementary to such a right, not a substitute for it.

The equitable remuneration right that is sought here must be independent of any agreed terms for the transfer or assignment of the exclusive right. This is consistent with the EU acquis and, in particular, a similar mechanism introduced by Directive 2006/115/EC on rental and lending, which was never made conditional on the terms agreed for the transfer of these exclusive rights. In most cases, performers transfer all their rights in perpetuity in exchange for an upfront payment that is disconnected from the actual revenue generated by the use of their work. As the Directive does not define the concept of "equitable remuneration", this provision would in fact amount to saying that whatever is considered to be "equitable" by a producer when engaging a performer will in the end be all that this performer will be entitled to. This is exactly the opposite of what this new right intends to achieve, i.e. to offer to all performers the guarantee of on-going payments as long as their performances are commercially exploited by online platforms.

Finally, whilst we support the granting of an unwaivable equitable remuneration right to authors and performers for when their making available right is transferred or otherwise assigned and understand the wish to include this right in Title IV since it does not have a contractual nature, we note that such title is about achieving a well-functioning marketplace for copyright only. The title itself should thus also be amended to include neighbouring rights. We feel however, that a much better option would simply be to amend the language of Chapter 3 (Title IV) to read 'Fair remuneration ~~in contracts~~ for authors and performers" and introduce this provision as a new article 14, all succeeding articles renumbered accordingly.

II. TRANSPARENCY OBLIGATIONS

WE SUPPORT AM. 466 Cavada et al.

<p>Recital 41</p> <p>(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 will ensure that the representative organisations of all relevant stakeholders determine sector-specific requirements and establish standardised procedures and formats for presenting the information in each sector, promoting automated processing making use of digital technologies and international identifiers of works. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations as those are already subject to transparency obligations under Directive 2014/26/EU.</p>

Justification

This amendment clarifies that only representative organisations of all relevant stakeholders will be in charge of establishing the most appropriate procedures for an efficient implementation of transparency principles. This prevents the circumvention of transparency obligations via pro forma consultations with insufficiently representative groups of stakeholders.

WE OPPOSE AMs. 465 Karim et al, 468 Buda, 473 Buda, 474 Karim et al, 475 Maullu, 914 Rohde and 916 Voss

Justification

These amendments convey the unacceptable principle that some performers and other creators may be deprived of the right to transparency, based on a questionable assessment of their contribution to the work or performance. Transparency obligations should apply irrespective of the "nature", "relevance" or "significance" of the contribution, which are not objective criteria. Should any such restriction be kept or introduced, performers and other creators could thus be deprived of the right to transparency that the Directive is seeking to introduce, based on unpredictable, unjustified or unfair reasons.

WE OPPOSE AM. 877 Maullu

	<p>Article 14 § 1</p> <p>1. Member States shall ensure that authors, performers, publishers, producers and their respective successors in title, in connection with the licensing agreements under Article 13, receive on a regular basis and taking into account the specificities of each sector, timely, adequate, accurate and sufficient information and reporting on the exploitation of their works, plays and performances from those to whom they have licensed or transferred their rights, notably by indicating modes of exploitation, modes of promotion, revenues generated and remuneration due.</p>
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Justification

This amendment contradicts the very intention of the proposed Directive, by attempting to include producers and publishers within the scope of the right to transparency. The transparency obligations introduced by the Commission's proposal are meant to benefit performers and other creators only, not producers and publishers. On the contrary, the latter are precisely those who should provide information to performers and other creators in all transparency.

SUGGESTED COMPROMISE AMENDMENT drawing on AMs 878 Chrysogonos et al, 882 Honeyball et al, 883 Rozière et al, 884 Guoga, 885 Niebler et al, 886 Guteland, 888 Zwiefka et al, 889 Comodini Cachia, 890 Adinolfi et al, 891 Svoboda, 892 Regner et al, 893 Geringer de Oedenberg et al.

<p>Article 14 § 1 Member States shall ensure that authors and performers receive on a regular basis, no less than once a year and taking into account the specificities of each sector, accurate and comprehensive 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 all modes of exploitation, promotion, the direct and indirect revenues generated and remunerations due.</p>

Justification

These amendments seek to improve the proposed reporting obligations to make sure they deliver a true and reliable picture of the revenues, both direct and indirect, that are made from any contractually agreed use of the audiovisual work and/or the performance. This information is essential for them to make sure that the original contract is being honoured and that, for instance, no additional use is made that was not initially agreed in the original contract. This information is essential also in light of subsequent articles 15 and 16 in the draft Directive.

WE SUPPORT AM. 895 Maštálka et al.

<p>Article 14 § 1a (new) 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 right holders.</p>

Justification

We strongly support this amendment, which addresses a notable shortcoming of the Directive 2014/26/UE on collective management. In its article 17, this Directive establishes certain reporting obligations for users of protected content. In most cases, the latter will be able to identify the works that they use but will not necessarily know the identity of all the individual right holders in those works. As every record, film or audiovisual work can include a multitude of performers, as opposed to authors or producers, performers' collecting societies must invest considerable resources (i.e. performers' money) finding those right holders, which in turn may delay the administration of these payments. Despite having all the necessary information to properly identify them, audio or audiovisual producers are under no obligation to deliver it. In some countries, performers' collecting management organisations have to pay hefty amounts to access the producers' databases. Such costs are unjustified and not reasonable.

This simple measure would tremendously increase transparency with respect to the remuneration of performers and further contribute to reducing time and administrative costs as to how it is administered.

SUGGESTED COMPROMISE AMENDMENT drawing on AMs. 899 Reda, 900 Adinolfi et al, 901 Geringer de Oedenberg et al, Honeyball et al.

	Article 14 § 2 The obligation in paragraph 1 shall be proportionate and effective and shall ensure a high level of transparency in every sector, as well as an <u>audiovisual author's or performer's right to audit.</u>
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Justification

Proportionality already provides for adequate flexibility when implementing the transparency obligation set forth by this article. It also puts the burden of proof on the producer and provides authors and performers in the audiovisual sector with the right to scrutinise the appropriateness of the information We thus urge members of the Parliament to support the deletion of the last sentence of the second paragraph, as it adds an arbitrary assessment that may be exploited in a way that is very detrimental to performers and audiovisual authors.

WE SUPPORT AM. 918 Honeyball et al.

	Article 14 § 3 3. 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.
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Justification

This amendment underlines the key contribution of truly representative organisations of stakeholders for the adoption of efficient reporting procedures.

WE SUPPORT AMs. 909 Geringer de Oedenberg et al, 910 Adinolfi et al, 911 Reda, 912 Svoboda, 913 Maštálka et al.

	Article 14 § 3 deleted
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Justification

This provision that this amendment aims to delete is completely unacceptable as it implies a subjective and arbitrary assessment of the "significance" of a performance. It would empty the article of any practical meaning for performers or audiovisual authors. We strongly recommend its deletion and call on all members of the European Parliament to support this recommendation.

III. CONTRACTUAL ADJUSTMENT MECHANISM

WE OPPOSE AMs. 932 Buda and 954 Rohde

Justification

These amendments to Article 15 § 1 (932) and § 1a (new) (954) are completely unacceptable as they imply a subjective and arbitrary assessment of the "significance" of a performance. They would empty the article of any practical meaning for performers or audiovisual authors. We strongly recommend their deletion and call on all members of the European Parliament to support this recommendation.

WE OPPOSE AMs 937 Rohde and 950 Guoga et al.

Justification

These amendments to Article 15 § 1 (937) and § 1a (new) (950) introduce the notion of "unanticipated" (937) or "unexpected" (950) and "net" revenues (937 and 950). Anticipation is a concept that cannot reasonably be taken into account as it relies to a large extent on the good or bad faith of the party that collects the revenues and could be subject to a claim from one or more artists. Furthermore, in light of the imbalanced bargaining power between performers/creators and producers, the fact that revenues may or may not have been anticipated at point of contract is irrelevant and should not prevent performers/other creators from seeking a more equitable share of those revenues, when exceedingly significant in comparison with the remuneration initially agreed. The reference to "net" revenues opens the door to all sorts of deductions which could eventually render the provision meaningless.

WE OPPOSE AMs. 938 Karim and 946 Maullu

Justification

These amendments to Article 15, para. 1 would completely pre-empt any possibility for performers and other creators to benefit from the contract adjustment mechanism. By replacing "Member States shall ensure" by "Member States may provide" (938) or "may require" (946), they give Member States the freedom to ignore this mechanism entirely.

WE SUPPORT AM. 953 Chrysogonos et al.

Article 15 § 1a (new) <i>Member States shall provide authors and performers with a reversion right 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.</i>
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Justification

This amendment extends the scope of a provision already included in Directive 2006/116/EC (as modified by Directive 2011/77/EU), which provides music performers with a right to terminate a contract after 50 years if the producer does not make a recording available in sufficient quantities. Based on the same reasoning, it is only fair to allow authors and performers to enter in a new contractual relationship if their current co-contractor fails to carry out its duties properly.

SUGGESTED COMPROMISE AMENDMENT drawing on AMs 939 Rozière et al, 941 Adinolfi et al, 942 Guteland, 951 Svoboda

<p>Article 15 § 1 Member States shall ensure that authors and performers are entitled to <i>claim, individually or through their representative organisations, adequate contractual adjustments</i> from the party with whom they entered into a contract for the exploitation of the rights <i>or their successor in title</i> when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits, <i>whether direct or indirect</i>, derived from the exploitation of the works or performances.</p>

Justification

We believe that all performers and audiovisual authors should have the right to claim a revision of the terms in the original contract, under which they were first engaged. We strongly support the JURI amendment aiming at enabling representative organisations of authors and performers, such as their trade unions, to act on behalf of their members. This is because few performers would have enough leverage to individually seek contractual adjustments. This wording is to be preferred to "appropriate remuneration" since it may enable audiovisual authors and performers - or their representative organisations – to challenge unfair contractual terms more effectively.

In order to properly measure the proportionality of the remuneration originally agreed with revenues and benefits derived from the exploitation of a work or performance, all forms of exploitation, whether direct or indirect (e.g. advertising) must fall in the equation. With respect to this provision, and in light of some amendments that have been tabled, we categorically refuse the concept of "net and unanticipated revenues". The fact that subsequent direct or indirect revenues may or may not be anticipated is completely irrelevant, considering the weak and unbalanced bargaining power that performers have at point of contract, where the only contractual freedom they enjoy is to sign or not to sign. Claiming additional revenue at that point in light of future anticipated revenues would simply mean for most of them losing a new job opportunity. Equally, producers can be very creative when it comes to declaring net revenues, deducting costs and expenses that should not enter into the equation in order to escape their obligations. This is why we believe that the reference to net revenues will ultimately not be of any help to performers and audiovisual authors.

WE SUPPORT AM. 949 Maštálka et al.

<p>Article 15 § 1a (new) <i>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.</i> <i>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.</i></p>
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Justification

We strongly support this amendment. If the Directive is to seriously improve the contractual situation of performers and authors, it must also address unfair contractual practices that are unfortunately extremely

widespread in the industry. It is commonplace for performers to transfer all their exclusive rights at point of contract, for any use – whether known or unknown – and without any geographical boundary (essentially the whole world).

WE SUPPORT AM. 957 Adinolfi et al.

Article 15 § 1b (new) Any contractual provision contrary to paragraphs 1 and 2 shall be null and void.

Justification

We support this amendment as it brings additional security to performers against pressures exerted by the producer at point of contract, which may entail acceptance of very unequal terms, contrary to what the preceding two paragraphs intend to deliver.

IV. DISPUTE RESOLUTION PROCEDURE

SUGGESTED COMPROMISE AMENDMENTS drawing on AMs 66 Rapporteur, 962 Maštálka et al, 966 Adinolfi et al, 967 Chrysogonos et al, 968 Regner et al, 969 Honeyball et al, 970 Guoga

Article 16 § 1 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 alternative dispute resolution procedure. <i>The author's or the performer's contractual counterpart shall take part, in good faith, in the dispute resolution procedure.</i> <i>Such mechanism shall guarantee impartiality, be affordable <u>and</u> equally accessible.</i> <i>Member states shall ensure that 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, as appointed by them.</i>

Justification

Alternative dispute settlement mechanisms should not be left to the goodwill of the strongest party - i.e. the producer - but rather be made a compulsory first step to finding possible solutions to contractual disputes. Producers should engage in good faith in these procedures. Appointing representative organisations, such as trade unions, to represent the interests of the weakest party is absolutely key as many performers and audiovisual authors are unlikely to take individual action.

V. RIGHTS IN PUBLICATIONS

WE SUPPORT AMs 786 and 789 Adinolfi et al, 787 Reda, 788 Maštálka et al, 790 Rohde

Justification

Article 12 could set a negative and very harmful precedent, leading to the unfair expropriation of the compensation due to performers for certain exceptions or limitations. These revenues are a non-

negligible, stable and unwaivable source of income for them. Reversing this situation, would make it impossible for performers to hold on to this compensation and will result in them getting even less and producers more.

*For these same reasons, **WE ALSO OPPOSE** Am. 793 Dzhambazki, expressly extending the scope of this article to performers.*

VI. VALUE GAP

The value gap proposal in article 13 and any amendment aiming to strengthen it can only be acceptable if complemented with an unwaivable right for performers to equitable remuneration (as mentioned above).

The rights and revenues that article 13 attempts to protect are entirely in the hands of the producers. Therefore without the right to equitable remuneration, the value gap between most performers and their producers, pertaining to the online exploitation of performances, has no chance of delivering a tangible improvement of performers' revenues.

For more information:

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