Position Statement of the

Max Planck Institute for Innovation and Competition

on the Proposed Modernisation of European Copyright Rules

PART D

Copyright Contract Law

(Article 10, Articles 14 - 16 COM(2016) 593)

I. Background

1. Copyright contracts are the first and indispensable legal act after the creation of a work to trigger the value chain of exploitation. Contracts are also the basis for authors and performers to involve third parties in bringing a work or performance into the public sphere. Therefore, **copyright contract law** influences the **copyright balance** between different players in a number of ways. Contract law is becoming even more relevant in the digital age, in which new intermediaries – such as internet providers – are increasingly joining or even replacing traditional publishers or producers.

2. A report commissioned by the European Parliament's Directorate-General for Internal Policies to assess the state of copyright legislation in Europe highlights three issues, related to technological, social and economic development, that need attention (see S. Dusollier et al., Contractual arrangements applicable to creators: Law and practice of selected member states, Brussels, 2014):

    - New internet-related business models are likely to disrupt the balance of interests in contracts between authors or performers and exploiters; media companies tend to **acquire all possible rights**.

    - Secondary exploitations (such as traditional broadcasting, rental or

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public lending) are becoming less important; works and performances are increasingly exploited by other entities that **evade the fair remuneration** previously ensured by mechanisms of collective rights management.

- Increasing **cross-border** exploitations and uses of works in an environment of inconsistent national legislations enhance the already existing fragmentation and increasingly undermine the protection provided for authors and performers by copyright contract law.

3. The European Union has frequently pointed out the need to ensure appropriate rewards to authors and performers. Indeed, Articles 10 and 14 to 16 of the proposed Directive go in this direction. They intend to

   - facilitate the licensing of rights in audiovisual works to video-on-demand platforms;

   - ensure that authors and performers are given adequate information by their contractual counterparts to assess the economic value of their rights;

   - allow authors and performers to renegotiate long-term contracts.

   The purpose behind these proposals certainly may be welcome; the provisions as they stand, however, are largely useless or may even turn out to be a harmful superstructure within the European *acquis*.

II. Concerns about the Commission's Proposal

1. Competence

4. The legislative competence of the **European Union** (EU) should be more carefully justified by the Commission.

5. According to the principle of conferral ("Prinzip der begrenzten

Einzelermächtigung"), as stated in Article 5 of the Treaty on European Union, the EU has competence to legislate in a given area whenever the **Treaties** (the Treaty on European Union, TEU, and the Treaty on the Functioning of the European Union, TFEU) empower it to act in order to achieve the objectives set therein. The competence of the EU to act in the field of copyright law is primarily based on Articles 118 and 114 of the TFEU, which however do **not** explicitly give the EU legislature a **general competence for copyright contract law**.

6. However, the mentioned provisions of the TFEU grant the EU legislature a **functional competence**; there must be a link between the aim and content of the measure and the establishment of an internal market. From this perspective, rules on copyright contracts between authors or performers and exploiters might fall under the shared competence of the European Union. Moreover, certain **integration clauses** in the Treaties require the EU institutions to integrate particular horizontal policy interests in their actions under internal market policies. There are three main integration clauses that are relevant to copyright: culture (Article 167 TFEU), consumer protection (Articles 12 and 169 TFEU) and competitiveness of the Union's industry (Article 173 TFEU). As for **culture** in particular, according to Article 167(2) TFEU, action taken by the EU "shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action" in the area of artistic and literary creation, including in the audiovisual sector.

7. The protection of the interests of authors and performers has always been one of the primary goals of the EU legislature. The *acquis* contains various references to the general need of protecting authors and performers and the aim of rewarding them is expressly recognised throughout the *acquis*. A case in point is Directive 2006/115/EC (Rental Directive), which introduced an unwaivable remuneration right for authors and performers. Directive

2001/84/EC (Resale Right Directive) is another example. It provides for a right to share in the successive sales of an original work of graphic or plastic art. However, unless contract law practices are taken into consideration, the primary goal of protecting authors and performers will not have the necessary strength. In the absence of mandatory provisions related to contracts, measures intended to reinforce the authors' and performers' rights might ultimately benefit copyright industries.

8. Supposing European competence on copyright contract law is indeed affirmed and sufficiently justified in this respect – an issue not properly clarified in the Commission's proposal – European legislation must also be **effective** in safeguarding the interests of authors and performers.

2. Neglected issues

9. First of all, the European legislature should be **more ambitious** about taking a **comprehensive approach**. In its proposal, the Commission focusses on a few significant issues only, while largely ignoring the generally weak position of authors and performers, in particular

    - in determining the **scope of transfer** of rights or the prevention of all-encompassing and time-unlimited assignments;
    - in providing for an "**appropriate" remuneration** in the **initial agreement**;
    - in **enforcing** protective legal provisions.

    As far as certain issues are addressed, the proposals of the Commission turn out to be too narrow and to some extent misleading.

3. Shortcomings in the proposals

a) Article 14

10. The proposed Article 14 covers both aspects of transparency and financial reporting related to the exploitation of works. However, paragraphs 2 and 3 qualify these obligations in relation to administrative expenses. Therefore, depending on the implementation of this provision in national law, authors and performers with limited bargaining power could be deprived of information relevant to them. This contradicts the fact that the digital environment considerably facilitates an administration of the exploitation of works. In view of that it seems appropriate to establish general reporting obligations to the benefit of **all authors and performers**. Adequate information is essential in order to apply Article 15, which unconditionally entitles all authors and performers to request additional, appropriate remuneration if the remuneration originally agreed upon is disproportionately low.

11. However, if the EU legislature should maintain such a limit according to proportionality, it should at least provide for clear guidelines regarding the scope of information duties, but also introduce adequate **distinctions** between different types of works and differing contexts of commercialisation. At the same time it should be explained to what extent this right to information can be balanced with legitimate interests of private companies in keeping their own commercial strategies confidential.

12. Beyond that, Article 14 needs to clarify the **parties responsible for providing the relevant information**. Reporting obligations may not be limited to the direct contractual partners of authors and performers. Such obligations should – at least indirectly – also be imposed on sub-licensees (such as content providers or other exploiters). Ensuring adequate shares to authors and performers presupposes their full understanding of the financial

flows related to their works and performances.

b) Articles 15 and 16

13. Article 15 aims to ensure "appropriate" remuneration to authors and performers based on additional payments upon request. This attempt is certainly worthy of support. There are, however, **two shortcomings**.

14. **First**, adjustments in a (merely potential) renegotiation phase are of an exceptional nature and presuppose rather specific constellations – but it remains unclear how (and by whom) the "appropriateness" of the remuneration needs to be assessed. This "second best" approach leaves the structural problems of unequal bargaining power of the contracting parties unaddressed; it is the **original contract** in the first instance that should provide for "appropriate" remuneration. This issue is not at all addressed in the Commission's proposal.

15. **Second**, Article 15 is limited to payments for the transfer or licensing of exclusive rights. This disregards the fact that the copyright *acquis* partly allows for a replacement of exclusive rights by fair compensation or equitable remuneration (e.g. in the case of private copying or rentals). This provides for an **alternative payment mechanism** that should be taken into account in an overall assessment of the economic situation of authors and performers.

16. At the same time it is worth examining the value of such payment mechanisms for all parties involved. In fact, this approach presupposes that the participation in a payment for uses under an exception or limitation is stipulated as unwaivable. This, however, applies in Article 5 of the Rental Directive only, whereas similar rules are missing in Directive 2001/29 (InfoSoc Directive). The Court of Justice of the European Union (CJEU) has nevertheless interpreted the InfoSoc Directive as guaranteeing not only the participation, but the full amount of fair compensation to authors as the

original rightholders (see C-277/10, *Luksan Martin Luksan v Petrus van der Let*; C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL*). These decisions give rise to a number of questions addressed in detail in Part F of this Statement, to which reference is hereby made. The CJEU interpretation is particularly doubtful if an exception or limitation primarily harms the contractual partner (e.g. the publisher), but not the author or performer.

17. What is most important for the present discussion, however, is the need for clarification of the terminology used in the copyright *acquis*. The unclear delineation of the notions "equitable remuneration" and "fair compensation" blurs the overall picture of the economic situation of authors and performers on the one hand and their contractual partners as derivative rightholders on the other. If the proposed Article 15 focusses on an "appropriate remuneration", but is limited to the adequacy of payments for the transfer or licensing of exclusive rights, it masks the interplay of different payment mechanisms.

18. Although the scope of Article 15 is limited, it is questionable whether it ultimately will help authors and performers to receive "appropriate remuneration" based on renegotiation. Adequate ways to enforce such claims are missing. The proposed Article 16 obliges Member States to provide for a voluntary, alternative dispute resolution procedure. This is certainly promising if the involved parties are willing to settle a case. In cases of structural imbalance with largely unequal negotiating power, combined with a lack of mandatory enforcement mechanisms as a last resort, however, it appears rather naive to believe that the Commission's proposal would change anything compared to the current situation.

19. One measure to protect the authors' and performers' interests in long-term contracts is a so-called "rights reversion". This enables them to **terminate a contract**, namely in the case of lack of exploitation, lack of payment of the expected remuneration or lack of regular reporting. The Commission has not

envisaged that measure, although some Member States have already introduced it in their legislation, though with great variation from one country to another. A "rights reversion" clause may apply to all or specific kinds of copyright contracts, such as publishing contracts and film contracts. It is obvious with a view to the aim to establish a digital single market that this measure should apply consistently across Europe. This suggests an additional provision defining the grounds for which a "rights revision" may apply.

c) Article 10

20. The proposed Article 10 resembles Article 16. Of course, the facilitation of licensing agreements in general and of agreements for the purpose of making available audiovisual works on on-demand video platforms is desirable. In practice, however, the effectiveness of an impartial body providing assistance with negotiations and helping to reach agreements seems limited. It is also not clear why the scope of Article 10 should be limited to audiovisual content.

21. Beyond the limited impact, the proposed provision seems to be a carte blanche for Member States. Some flexibility certainly may be welcome. Sufficiently clear guidelines, however, are missing, to the detriment of a reasonable degree of harmonisation across Europe.

III. Conclusions

22. The European legislature, when providing protection to authors and performers by the means of copyright contract law, should take into account two major aspects:

    - Authors and performers on the whole have less bargaining power than their contractual partners; possible measures to counteract this weakness are contract formalities, exploitation obligations and

reporting obligations. Further, protection of authors and performers may require time limitations for licensing agreements, renegotiation mechanisms or a "rights reversion".

- "Appropriate" remuneration for authors and performers may be safeguarded through various measures. Beyond obligations of transparency and reporting mechanisms, the European legislature should determine the "appropriateness" of a payment in more comprehensible ways. Additionally, in cases of compensation of rightholders for uses based on limitations and exceptions through collecting societies, unwaivable participation of authors and performers may provide them with relevant income.

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