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WORKING PAPER

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From:	Presidency
To:	Working Party on Intellectual Property (Copyright)
Subject:	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Presidency questions and compromise suggestions on selected issues

In preparation of the discussions at the Copyright Attachés meeting on 30 November 2018, delegations will find attached some questions and compromise suggestions from the Presidency on selected issues of the above mentioned proposal.

Annex

1. Article 7 Use of out-of-commerce works by cultural heritage institutions

- "representativity", paragraphs 1 and 4

The Commission would like to "clarify" the representativity requirement in Article 7(1) by adding the requirement that the collective management organisation should be sufficiently representative on the basis of mandates from rightholders directly affected by the licence or representation agreements based on such mandates. This would imply that representativity has to be assessed with regard to all (national as well as foreign) rightholders.

The Presidency tends to believe that this would change the concept of Article 7(4) of the Council mandate according to which representativity should be assessed on the basis of the national repertoire of the country where the cultural heritage organisation is established.

- **Would such change suggested by Commission be acceptable for Member States?**

2. Commission proposal on technical changes to Article 9a *(see separate document WK 14647/2018)*

3. Article 14 Transparency obligation

Paragraph 3: not significant contributions

The EP wants to delete paragraph 3 excluding "not significant contributions" and offers as a compromise that information for "not significant contributions" could be given the rightholder upon request only.

- **Would this be an acceptable solution for Member States?**
- **Can Member States show any flexibility on a reduction of paragraph 3 or should the Presidency stay firm on the Council mandate?**

4. Article 15 Contract adjust mechanism

The EP wants to protect authors/performers against blacklisting by entitling representative organisations to act on behalf of them to claim additional remuneration. The Presidency offered that these organisations could act "at the specific request" of authors and argued that claims based on Article 15 are based on individual contracts and therefore cannot be claimed in the own name of an organisation. As a compromise, the Presidency offered to introduce only the neutral term "representative" ("authors and performers or any representatives are entitled to claim additional …").

- **Do Member States share the Presidency´s approach?**

5. Article minus 14 Principle of remuneration (Commission compromise suggestion WK 13585/2018)

The Presidency takes a cautious approach with regard to Article minus 14 as adopted by EP. On the one hand, it is clear that the EP would not accept the Directive without "getting something" on this Article and we understand from the discussions at the Council Working Party that there is some openness of MS to go into the direction of the EP on this point. However, we do not only need a majority of Member States on this Article but – given the quite fragile majority for the Council mandate – the Presidency is very conscious that we have to tread very carefully in order not to lose the necessary support for the Directive as a whole.

(a) Principle of appropriate and fair remuneration

As a starting point, Member States seem to broadly support to re-iterate the principle of fair and appropriate/proportionate remuneration either in the recitals or even in an Article. However, what the EP has adopted seems to go beyond such a principle.

- **Could Member States accept the introduction of such a principle in the Article / in a recital?**

(b) Contractual right to appropriate (and proportionate) remuneration

The Commission services proposed a contractual (and proportionate) right to appropriate remuneration as a compromise suggestion (as discussed at the Council Working Party on 15 November). The Presidency understands that this proposal would limit contractual freedom for the benefit of authors and performers. Authors and performers would have the right to claim additional remuneration for future acts of exploitation as well as of for acts of exploitation already taken as long as limitation periods have not elapsed.

This could potentially lead to a substantial number of court cases dealing with the question of what is a fair and appropriate/proportionate remuneration. Without any accompanying measures providing "safe harbour rules" for the copyright industries the contractual partners of authors and performers would lose legal and planning security as their opinion on appropriateness of remuneration might prove wrong and endanger their investment by unexpected costs.

However, we know that several Member States have well developed practices on a contractual right to appropriate remuneration. If Member States are willing to go into this direction, the provision proposed by the Commission might need further exceptions and limitations as provided in those national copyright acts, which have such a contractual right already.

- **Could Member States accept that authors and performers have a contractual right to fair and appropriate/proportionate remuneration according to which an author has the possibility to claim additional remuneration if the remuneration agreed upon would be too low (thus going beyond Article 15)?**

- **In case this is acceptable, would Member States need discretion on how to regulate such a right especially to provide for limitations where needed?**

(c) Proportionate remuneration

In addition to a right to fair remuneration, the EP asks for proportionate remuneration in the meaning that authors and performers should participate in revenues stemming from the ongoing exploitation of their works and performances. The compromise suggestions by the Commission services explain in a recital that lump-sum agreements will be still allowed under certain circumstances.

- **Could Member States accept a provision, which provides for proportionate remuneration as long as lump-sum agreements and licensing/transfer of rights granted for free are not prohibited? Does the Commission´s text provide for sufficient flexibility in this regard?**

(d) Modes of exploitation

Whereas the EP asks for contracts specifying the remuneration applicable to each mode of exploitation, the Commission compromise proposal introduces a new element by stipulating that contracts should explicitly specify the modes of exploitation. This would probably have the effect that blanket licenses covering all (including future) modes of exploitation would not be possible.

The EP has not been very clear on the meaning of its proposal. At the last trilogue, the EP explained that it would be important to distinguish between offline and online uses.

- **Could Member States accept an obligation to specify modes of exploitation having the effect that blanket licenses covering all (including future) modes of exploitation would not be possible?**

- **Could Member States accept an obligation according to which the remuneration attached to each mode of exploitation should be specified where appropriate? Do we need other/additional terms to limit the obligation ("where possible")?**

6. Article 16a Mechanism for the revocation of rights (Commission compromise suggestion WK 13585/2018)

As regards a mechanism for the revocation of rights, Member States have expressed considerable support as well as considerable opposition in Coreper on 23 November. The Presidency would like to meet the concerns of Member States, who are still opposed to Article 16a as drafted by the Commission services by adding more flexibility for Member States. The texts of the EP and the Commission services already contain some elements, which could be broadened or generalized for this purpose. Such a solution could read as follows:

"Specific provisions of the mechanism for revocation should be regulated by national law taking into account the specificities of different sectors, works and performances. Member States may exclude works or subject matter from the application of the mechanism if such works or subject matter usually contain contributions of a plurality of authors or performers. They may provide that authors or performers may terminate the exclusivity of the contract instead of revoking the rights."

- **Would a mechanism for the revocation of rights because of a lack of exploitation be acceptable for Member States if they would have broad flexibility to regulate the exercise of this right?**