

INFORMATION NOTE FOR PRESIDENT MARTIN SCHULZ FOLLOWING A MEETING ON 2 SEPTEMBER 2015 WITH THE PRESIDENTS OF ECSA, EFJ, EWC, FERA AND FSE: FIVE EUROPEAN ORGANISATIONS REPRESENTING AUTHORS.

Brussels, 07.01.2016

**Europe – defined by its arts and culture**

Europe's diverse arts and culture are what define us. Both in the way we see and understand ourselves, and in how others see us, it is our extraordinary wealth of centuries of cultural output and the huge variety and authority of contemporary culture that identifies Europe.

The creators of this cultural resource, an accumulation of many millions of individual creative works, are Europe's cultural added value. Writers, literary translators, journalists, composers, screenwriters and directors are an important part of a core aspect of Europe's identity. Authors' rights or copyright is the legal underpinning that protects the individual creativity that provides the vast array of cultural goods available to European consumers.

**European culture is immensely popular with consumers...**

It is difficult to imagine that there is any European citizen who does not listen to music daily, watch fiction on television or in the cinema and read newspapers, journals and books. This active consumption of cultural output in Europe creates vast opportunities for business in the production, marketing, sale and distribution of Europe's cultural works.

**...and immensely successful economically.**

According to a recent study by EY the European creative industries have €554b of annual turnover creating employment of more than 7.2 million Europeans and representing 4.2% of Europe's GDP.

**But European authors' careers remain poor and unstable.** Despite this extraordinary wealth Europe's authors are poorly paid with highly unstable careers. (Annex One – surveys of authors' income)

The causes of this situation are simple: despite basic legislation usually being in place, authors do not receive equitable remuneration for the use of their economic rights and their moral rights are too often disregarded.

While some authors work under employment contracts and may benefit from collective agreements, many work on a freelance basis which excludes them from many of the

economic and social safeguards which European society provides for those in employment. The nature of their work also means that they usually work from one contract to the next. Usually an author has no guarantee that there will be any further contract of work after the one on which they are currently working. Indeed many authors will make work for no income in the hope that it can be sold once completed. Additionally, they often find themselves in a take-it-or-leave-it situation where individual contracts are imposed on them without any possibility to negotiate.

This instability of income means that authors are especially susceptible to changes in the economic situation. The recent recession does not seem to have reduced the overall amount of work being produced in any sector of the creative industries but rather has had a substantive impact on the budgets available for producing creative work, achieved in part by reducing fees paid to freelance authors. Since authors' works are increasingly being distributed in the online environment many are suffering from a reduced income as such use is often considered as part of the original broadcast/reproduction. Authors are not able to benefit from receiving any significant income from online distribution, representing a substantive transfer of value from authors to producers, publishers and broadcasters as well as online intermediaries.

In this difficult environment authors are negatively impacted by two structural disadvantages.

### **Collective agreements and competition law**

In many respects authors would prefer to address the problem of unfair contracts themselves and resolve them in negotiations with those with whom they contract. Collective bargaining would be the best way forward for this to happen with collective agreements in place to establish minimum standards for contract terms. In a number of Member States (Ireland, the Netherlands, Spain) collective bargaining has been forbidden by competition authorities because freelance authors are considered as individual entrepreneurs. In other countries, for example Germany, copyright law has specifically allowed collective bargaining for this category of author.

In response to President Schulz's specific request a short document on this issue is attached (Annex Two – Competition law and authors).

### **Unfair contracts**

Many authors work from contract to contract and some work under verbal agreement only. Each written contract is separately and individually negotiated. Publishers, producers and broadcasters are in a strong position to dictate terms to authors who are prepared to accept unfair provisions and low fees if the alternative is no contract at all. This is the key structural problem which undermines authors' incomes.

Many unfair contract terms include, for instance, the assignment to publishers/broadcasters of a worldwide, exclusive right to use, reproduce, display, modify and distribute a work in all types of platforms, known or future ones, for the entire duration of the works' copyright and without the possibility of rights reversion.

## **Contractual freedom**

Freedom of contract is seen both in the EU and its Member States as a general principle governing contractual obligations. However, experience has shown that safeguards needed to be introduced in order not to hinder the good functioning of the internal market and protect the weaker party to a contract.<sup>1</sup>

The European Commission adopted a directive in 1993 to respond to unfair terms in consumers' contracts (Council Directive 93/13/EEC). The Rome I Regulation (Regulation (EC) No 593/2008) provides for special protective rules for certain classes of structurally weaker parties, such as consumers and employees.

However, the contractual precariousness of authors remains unaddressed and none of these legal instruments have clearly tackled the creative sector.

An unfettered freedom of contract undermines the principle it intends to promote. Contractual negotiation which consistently disadvantages one side brings the principle of contractual freedom into disrepute. To make this egregious situation more problematic many contract negotiations, in the audiovisual sector in particular but also in other sectors of the arts, are state funded and the funds are provided more or less exclusively to the producer or publisher.

Some limits in respect of the sale (assignment) or rental (licensing) of authors' rights or copyright exist in most member states, in particular the idea that rights transfer must be express and in writing.

We are pleased to note that the Communication from the Commission to the Council and the Parliament published on 9<sup>th</sup> December contains a reference to the problems of Authors' remuneration and look forward to the specific proposals for action that may result.

## **What action could be undertaken at the EU level?**

The Treaty on the Functioning of the European Union (TFEU) states in Article 167 that the European Union supports member states' action in artistic and literary creation. Article 153 of the TFEU requires the European Union to support and complement the activities of the Member States in relation to working conditions. In this sense the European Council and the European Parliament may adopt minimum requirements for gradual implementation by means of directives.

We believe that a legal, binding instrument that secures the right to fair contracts for authors would pave the way for equitable contractual negotiations and ensure a decent income for

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<sup>1</sup>[http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2013/bvg13-071.html;jsessionid=5BB516CA899B90D5E9650F1E1B9F0165.2\\_cid361](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2013/bvg13-071.html;jsessionid=5BB516CA899B90D5E9650F1E1B9F0165.2_cid361)

the use of authors' rights. Inclusion of clauses securing the right to fair contracts in a future Directive addressing copyright reforms would be appropriate and practicable.

The following five principles would radically improve authors' contracts and consequently their income.

#### **Transfer and assignment of rights**

All transfers of rights must be subject to written contract and contractual transfers of rights must list each right which has been transferred separately, along with the level and payment process of remuneration in respect of each right transferred. Rights not explicitly listed are not transferred and unknown future rights cannot be transferred. Furthermore, transfer of rights must be limited in time with clauses of rights reversion and the possibility of renegotiations. A transmission of copyright and author's rights may be partial, that is, limited so as to apply to one or more, but not all, of the things the author has the exclusive right to do. Finally, moral rights must be non-transmissible, non-assignable and non-waivable.

#### **Reporting obligation**

Publishers or producers must have a reporting obligation; that is the obligation to detail on a regular basis the modes of exploitations undertaken and the revenues yielded by all exploitations imposed on first transferees but also on other content providers and exploiters in order to enable authors to have a broader understanding of the financial flows and their actual share in the their work's economic exploitation.

#### **Best seller clause**

Where the agreed consideration is disproportionate to the returns and advantages arising from the use of the work, the other party is required, at the demand of the author, to assent to a change in the remuneration to ensure some further equitable remuneration. The situation where the exploitation right is granted by the other party to a third party must also be covered. The claim for change cannot be waived.

#### **Reversion of rights**

Contracts must include a general principle of reversion of the rights transferred to enable the authors to terminate a contract, namely in case of lack of exploitation, lack of payment of the remuneration foreseen as well as lack of regular reporting.

#### **Contract Enforcement and Mediation**

Processes should be put in place in each member state to allow for mediation of disputes in respect of contracts dealing with transfer of rights. Such mediation processes must allow binding arbitration and parties to disputes must be able to be represented by their representative organisations.

## **Conclusion**

We respectfully ask for President Schulz's assistance to help ensure that the commitment made in the Communication from the European Commission to the European Parliament and the European Council concerning authors' unfair contracts is acted on and that he indicates to the Commission that the Parliament would support a legislative instrument to address the issue at a European level.



The European Composer and Songwriter Alliance (ECSA) represents over 30,000 professional composers and songwriters in 23 European countries. With 45 member organizations across Europe, the Alliance speaks for the interests of music creators of art & classical music (contemporary) and film & audiovisual music as well as popular music.

Web: [www.composeralliance.org](http://www.composeralliance.org)



The European Federation of Journalists (EFJ) is the largest organization of journalists in Europe, representing over 320,000 journalists in 61 journalists' organizations across 40 countries. The EFJ fights for social and professional rights of journalists working in all sectors of the media through strong trade unions. It strives to maintain or create environments in which quality, journalistic independence, pluralism, public service values and decent work in the media exist.

Web: [www.europeanjournalists.org](http://www.europeanjournalists.org)



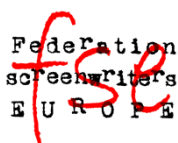
The European Writers' Council (EWC) was founded in 1977 in Germany and newly constituted in 2006 in Brussels as an international non-profit organisation. EWC is the federation of 50 European national organisations of professional writers and literary translators in all genres in 34 countries, writing altogether in 42 languages. EWC's members represent 433,000 individual creators, including more than 160,000 authors in the text sector.

Web: [www.europeanwriterscouncil.eu](http://www.europeanwriterscouncil.eu)



The Federation of European Film Directors (FERA), founded in 1980, represents film directors at European level, with 35 directors' associations from 29 countries as members. FERA speaks for more than 20,000 European screen directors, representing their cultural, creative and economic interests at the national and European level.

Web: [www.filmdirectors.eu](http://www.filmdirectors.eu)



The Federation of Screenwriters Europe is a network of national and regional associations, guilds and unions of writers for the screen in Europe, created in June 2001. As of 2011, it has comprised of 25 organisations from 19 countries, representing more than 7,000 writers in Europe.

Web: [www.scenaristes.org](http://www.scenaristes.org)

## **Annex One – surveys of authors' income**

### **Creative industries**

Global creative industries

<http://www.worldcreative.org/>

Creative industries in Europe

[http://www.ey.com/Publication/vwLUAssets/Measuring\\_cultural\\_and\\_creative\\_markets\\_in\\_the\\_EU/\\$FILE/Creating-Growth.pdf](http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/$FILE/Creating-Growth.pdf)

### **European Union Studies**

European Commission study on remuneration of authors in music and audio visual

<https://ec.europa.eu/digital-agenda/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations>

Study commissioned by the JURI Committee of the European Parliament

[http://www.keanet.eu/wp-content/uploads/IPOLJURI\\_ET2014493041\\_EN.pdf](http://www.keanet.eu/wp-content/uploads/IPOLJURI_ET2014493041_EN.pdf)

European Parliamentary Research Service – Implementation Assessment

[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS\\_STU\(2015\)558762\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU(2015)558762_EN.pdf)

## **Sectorial studies at the European level**

Screenwriters in Europe

<http://scenaristes.org/pdfs/fseleafletremunerationweb.pdf>

## **Sectorial studies at the national level**

Literary authors in United Kingdom

[http://www.alcs.co.uk/getattachment/Resources/Research/what-are-words-worth-now-NEW-ADDRESS-\(1\).pdf.aspx](http://www.alcs.co.uk/getattachment/Resources/Research/what-are-words-worth-now-NEW-ADDRESS-(1).pdf.aspx)

## **Screenwriters in Spain**

[http://www.sgae.es/recursos/pdf/El\\_guion\\_en\\_Espana\\_resumen.pdf](http://www.sgae.es/recursos/pdf/El_guion_en_Espana_resumen.pdf)

## **Screenwriters in Ireland**

<http://script.ie/zebbies/reports/zr2008/>

## **Screenwriters in France**

[http://www.guiledesscenaristes.org/uploads/ressbao/rapports-etudes/etude\\_gilde\\_cinema.pdf](http://www.guiledesscenaristes.org/uploads/ressbao/rapports-etudes/etude_gilde_cinema.pdf)



## **Annex Two – Competition law and authors**

### **NOTE ON COMPETITION LAW AND COLLECTIVE BARGAINING FOR EUROPE’S CREATORS AND PERFORMERS**

The creative industries in Europe are worth €550 billion and employ 7 million Europeans.

At the core of these industries are the creators and performers who produce the work on which the creative industries are built.

The vast majority of these persons are freelance workers. The usual nature of their work is that they present a creative project to a producer or publisher with whom they contract, the work is produced or not, and the process starts all over again.

In 2006 the Competition Authority in Ireland decided that a collectively bargained agreement between Irish Actors Equity and the Institute of Advertising Practitioners of Ireland was in contravention with competition law as it was, in their view, an agreement between “undertakings” (freelance actors) to fix prices.

In 2009 the Dutch competition authority informed the representative body of writers that the publication of agreed rates of pay for writing services contravened Dutch competition law.

The competition authorities in Spain insisted that ALMA and FAGA, representative organisations of screenwriters, remove from their websites indicative amounts which the guilds advised their members were appropriate figures to seek for comparable writing tasks. Both organisations were fined by the Competition Authorities and instructed to remove any reference to rates of pay from their website.

In the absence of minimum rates of remuneration and minimum contract standards creators and performers were especially vulnerable during the recession. Significant cuts in state funding of the arts in many member states in the period contributed to the negative effect. What is slightly surprising is that the volume of creative work did not decrease over the recession period – what did drop precipitously was the rate of remuneration paid to creators.

We are aware that the situation in respect of the application of competition law in other member states (e.g. Bulgaria and Belgium) would be the same as Ireland, the Netherlands and Spain were the matter to be taken up by their respective Competition Authorities.

In the United Kingdom competition law probably prevents such collective bargaining but the Competition Authority turns a blind eye in the belief that collectively bargained agreements would have negligible impact and thus such agreements are quite common.

By contrast Scandinavian countries often have collectively bargained agreements and such agreements are a requirement of German copyright law. German copyright law says that creators should receive equitable remuneration and goes on to define equitable remuneration as being the amount agreed between creators and producers/publishers.

This has resulted in an increasing number of collectively bargained agreements in Germany.

The clash between competition law and fair remuneration for creators has produced total confusion in Europe as to how creators fix their income, with the predictable result that their income is very low and highly unstable. This has to have a negative impact on the quality of work produced which is not in the interests of consumers.

What could be done?

A statement by the Competition authorities in Brussels that they do not consider collectively bargained agreements in the area of the production of culture to be a significant threat to competition given:

- a) its small size
- b) the dependence of the culture industries on state aid
- c) the negligible, if any, impact such agreements would have on consumer prices

A statement of this sort may allow member states to apply these principles at the national level.

Alternatively adoption at the EU level of the principles of German copyright law as described above in particular the definition of equitable remuneration as being that decided between representative organisations of creators and producers/publishers would effectively address the situation.