

# ECSA-FACDIM DRAFT RECOMMENDATION ON THE STATUS OF MUSIC CREATORS

## Revised clauses on unfair contracts (For informal review by the EC Copyright Unit)

### CONTEXT:

On November 5, ECSA and FACDIM held a joint symposium on the status of music creators in Europe today.

A draft recommendation was prepared prior to November 5. Speakers were asked to make specific suggestions to complement and improve the draft. Speakers' input was reviewed in the closed, afternoon session with experts from ECSA and FACDIM.

The Copyright unit was represented both in the morning session (Ms. Judit Fischer) and in the afternoon session (Ms. Ewa Biernat).

ECSA and FACDIM have agreed to review the provisions on unfair contracts included in the draft recommendation and to seek the opinion of the Copyright Unit of the European Commission (EC) on the revised clauses.

It is understood that the EC is not in a position to offer legal advice or formal amendments, but that its input is provided on an informal basis. However ECSA and FACDIM are committed to take into account this input, as the purpose of the draft recommendation is not to be a "wish list" but to provide a sound, realistic and reasonable path forward that may be submitted to EU policy-makers in the future.

### REVISED PROVISIONS ON UNFAIR CONTRACTS

#### 1. Provisions on unfair contracts in the initial draft recommendation

To facilitate the review process, the provisions on unfair contracts originally included in the draft recommendation are listed below:

- A musical work is the result of an authorial process and authorship is the only concept justifying and legitimating copyright law (whether works are paper documents or in digital form);
- Fairer and better contractual conditions for the protection and remuneration of authors of musical works must be actively promoted by EU policy-makers;
- EU policy-makers must continue work regarding unfair contracts for authors and strengthen the bargaining position of music authors thereby empowering them ;
- A termination right elaborated and incorporated into the EU legislative framework, should allow authors to take back their rights after no longer than 10 years;

- The EU legislative framework should prohibit the introduction of practices which permit 'work for hire' or 'buy out' contracts or require writers to unreasonably relinquish rights;
- Contractual and programming practices involving authors of music and programme makers must be monitored, to establish common guidelines and best practices for contracts and music commissioning particularly in the media and TV where the problem of unfair contracts and ongoing coercion is alarming.
- All authors should benefit from revenues from exploitation of their works, including the promotion of legal protection for authors to ensure fair private copying compensation, including equitable agreements engaging ISPs, telecom operators and search engines, and cooperation in resolving illegal digital usage to enable the rolling-out of legal services.

## **2. Revised provisions on unfair contracts submitted to the EC**

The revised clauses submitted to the EC are as follow:

- A musical work is the result of an authorial process and authorship is the only concept justifying and legitimizing copyright law (whether works are paper documents or in digital form);
- Fairer contractual conditions for the protection and remuneration of authors of musical works must be actively promoted by EU policy-makers;
- EU policy-makers should incorporate the recommendations of the study "*Contractual arrangements applicable to creators: law and practice of selected Member States*" published by the European Parliament in 2014 into the revised EU framework for copyright;
- EU policy-makers must seek inspiration from provisions on unfair terms included in the EU framework for consumer protection (in particular Directive 93/13/EEC on unfair terms in consumer contracts), which are based on the existence of uneven bargaining positions. By analogy to consumer protection, an unfair terms model precluding "black" terms<sup>1</sup> as well as any provision causing a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the author must be introduced in copyright law to balance the contractual bargain between the author and other parties to the contract;
- The imposition of minimal formalities in contracts transferring copyright, such as written form and the mandatory determination of the exact scope of the transfer and of the due remuneration, should be provided for in the revised EU framework for copyright;
- Contracts should be subject to a clause of revision in case of change of circumstances in the exploitation market or of commercial success of the work ("best-seller" clause);

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<sup>1</sup> "Black" terms are clauses that are deemed to be void and null if they appear in a contract. This could include clauses stipulating an indefinite duration without giving the author the possibility to review the contract; providing an unreasonably low remuneration for the transfer of rights; or covering unknown forms of exploitation without a separate remuneration for the author.

- Performers' revenue were improved by Directive 2006/116/EC on the term of protection of copyright, most notably via the introduction of a "use it or lose it" principle. A similar principle must be incorporated by EU policy-makers into the EU legislative framework, in particular in the context of the review of the EU framework for copyright;
- The EU legislative framework should prohibit the full transfer of the exclusive rights of the authors of musical works;
- Contractual and commissioning practices applicable to authors of music must be monitored to establish common guidelines and best practices, particularly in the TV/media sector;
- The role of collective management organisations (CMOs) is fundamental to ensure that authors of musical works receive an adequate remuneration for the exploitation of their works and performances. Mandatory collective bargaining between CMOs and programme makers should be required by law, with the aim of finding a mutual agreement defining fair remuneration;
- Member States should ensure that Directive 2014/26/EU on collective management of copyright and related rights is transposed at national level in a way that does not weaken collective bargaining; the European Commission should provide guidance to Member States during the transposition period to help them achieve this aim;
- Equitable agreements engaging Internet Service Providers, telecom operators and search engines must be encouraged to ensure fair remuneration of authors of musical works; cooperation among these actors in resolving illegal digital usage should also be supported;
- Obligations of transparency and reporting of financial streams and revenues related to the exploitation should be imposed on transferees and to some extent on further exploiters in order to enable authors to have a broader understanding of the financial flows related to their work and their actual share in its economic exploitation;
- The rights to equitable remuneration or fair compensation should be conceived as unwaivable rights, in line with the recent case law of the Court of Justice of the European Union (Luksan decision).