Review of the EU copyright acquis

– WHAT MUSIC CREATORS WANT –

ECSA is the representative body of composers and songwriters of all genres of music in Europe. The main objective of the alliance is to defend and promote the rights of music authors at the national, European and international level by any legal means. ECSA advocates for equitable commercial conditions for composers and songwriters and strives to improve the social and economic development of music creation in Europe.

This paper provides a detailed background on the position papers “review of the EU framework for copyright” and “fair remuneration for authors in the digital age”, which were already published by ECSA. It outlines pending issues related to the role of EU copyright law and remuneration of authors in the digital economy and proposes solutions to each issue advocated by ECSA. In summary it sets out:

i) What the situation is now

ii) What music creators want

iii) How this can be achieved

Introduction

ECSA believes that it is vital that the concerns of authors are at the centre of the upcoming debate on the review of the EU copyright acquis. It goes without saying that without composers and songwriters there would be no music to licence, no music to provide the soundtrack to the lives of most of the population in Europe and nothing to drive the growth and success of internet companies. Authors are the conceptual centre of copyright law and their work, irrespective of the length, maturity and completeness, is the result of intellectual effort, brainstorming, inspiration and talent; it is the result of a process necessitating time and, in particular, labour. In this regard it is vital that representatives of EU institutions appreciate the interest of authors in maintaining a strong legal regime, which protects and provides mechanism for authors to maintain control over the exploitation of their works. A set of exclusive rights is therefore fundamental: it strengthens the position of authors (who are by default in a weaker position) and ensures fair remuneration. As a consequence, authors are stimulated to create further works to the benefit of Europe's society and culture.

Whilst ECSA is aware that DG Digital Economy & Society is responsible for copyright within the European Commission, any solution is going to have to satisfy other DGs as well. ECSA would particularly highlight the need to more prominently consult DG Culture and Education, as copyright law is the legal regime for the arts and a cornerstone of Europe's cultural diversity.

i) What the situation is now

In a hearing last autumn in the European Parliament, Commissioner Oettinger stated, *"it is clear that further efforts are needed on copyright to complete the Digital Single Market. (...) We can prepare in the first part of the new Commission's mandate a targeted proposal on the reform of copyright, to take account of new technologies, new uses and new market conditions, which, while supporting innovation, will ensure fair remuneration for creators and allow creative industries to exploit the potential of the digital single market while increasing consumer's choice beyond national borders."* [1]

ECSA welcomes Commissioner Oettinger's reference to fair remuneration for creators and increased consumer's choice beyond national borders. Consumers are the audience of composers and songwriters and it is in the interest of music authors that their works are as widely diffused and exploited as possible, under the condition that authors are fairly remunerated. In this regard "remuneration for authors" should be the prerequisites of the reassessment of the EU copyright acquis.

As highlighted above, creating a musical work – irrespectively the genre of music - is the result of an authorial process, which necessitates time, creativity, judgement and labour. In order to stimulate further creation, it is pivotal to ensure that the exclusive rights of composers and songwriters are respected, wherever and on whatever medium the work in question is exploited.

[1] European Parliament, 29.09.2014

Intermediaries & social networks

Whilst article 5(2)(b) of directive 2001/29/EC ("infosoc") provides a mechanism for authors to receive compensation for the private copying exception,[2] it is regrettable that the EU copyright acquis does not provide further clarification on the role of intermediaries and social networks. No doubt, these new platforms offer opportunities for authors as their works are easily accessed by the public. However, authors have been greatly deprived of fair remuneration for the exploitation of their works, whilst – paradoxically - their creative effort is the reason for the popularity and financial success of intermediaries. The exclusive reproduction and communication to the public right is ignored with the argument that intermediaries are covered under the "safe-harbour" provision of the e-commerce directive. Yet it is evident that those platforms are doing far more than "hosting" works: they are providing user-friendly music playlists and engaging pro-actively with their users by suggesting further works to them, with the ultimate aim of creating greater user-traffic (for the purpose of generating income through targeted advertising adds).[3] It is evident that intermediaries not only reproduce works (through internal storage and copying works on playlists), but also engage in an act of communicating to the public as users are suggested further works to discover. Therefore article 2 and 3 of directive 2001 should be fully enforced.

Digital music services

Whilst digital streaming services currently represent a little less than 15% of the global music market share, it is likely that they will become a dominant model for accessing music in the future.[4] So far, the market for streaming is still evolving with subscription prices and advertising revenues lower than the prices which should prevail in a mature market.[5] Composers and songwriters throughout the world have been vocal in their criticism of the low payments they receive from these services for the use of their works. In the US, popular services like Pandora, Spotify and iTunes Radio pay "per-stream" fees to performers which vary from $0.001 to $0.005, with most hovering around $0.0012 (for authors, composers and songwriters, these amounts are even less!). In Europe the figures are very similar, if not worse. Yet even the astonishingly small amounts received don't always make it to the authors due to a number of highly questionable practices during both negotiations of rates and distribution of collected monies, compounding the already inequitable division of revenues.[6]

Record labels, which in some instances are also shareholders of the music service, receive advances from these services, as well as minimum payments under non-disclosure agreements (NDAs). These advances are non-attributable and there is no evidence that these advances are shared with authors.[7] In general, this business environment is highly in-

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[2] ECSA welcomes the recent ruling by the CJEU in the case C-463/12 - *Copydan Båndkopi* as it reaffirms the private copying levy system and provides continuity in that field of law (see, for instance, case C-467/08 - *Padawan*)

[3] For instance the streaming service Youtube suggests users similar works to the one users are currently watching or listening to;

[4] Pierre Lalonde, Study concerning fair compensation for music creators in the digital age (study commissioned by MCNA and CIAM); see page 2, para 5

[5] Ibid, para 6

[6] Ibid

[7] Rapport Pheline, *MUSIQUE EN LIGNE ET PARTAGE DE LA VALEUR, État des lieux, Voies de négociation et rôles de la Loi, Rapport à Madame la Ministre de la Culture et de la Communication*, November 2013

transparent as online music platforms insist that contracting parties (including labels, publishers and CMOs) make contracts under NDAs, thereby preventing them from sharing with the respective right holders the rates negotiated for their works.

Lastly, the share of distributed rates is greatly unbalanced. Monies distributed to right holders by streaming services should be split at least 50/50 between the two main right holders groups: record labels/performing artists and publishers/music authors. Yet, major record labels receive up to 97% of revenues that flow to all music right holders, leaving as little as 3% to be shared among music authors and their publishers. A combination of regulatory constraints, market imbalances and major record labels negotiating with services for all types of right holders has led to this disparity.[8]

Contractual arrangements relevant to individual authors

Composers and songwriters are at the origin of the value chain of the music industry. Usually music writers entrust publishers with the commercial exploitation of their works and in return receive advance payments. The first contract, in which the author assigns parts of the acts he or she has the exclusive right in, is a delicate episode. In most cases authors are in a weaker bargaining position due to their inexperience, lack of information and legal knowledge, as well as their desire to have their work exploited commercially.

Particularly concerning is the abuse of creative commons licenses by TV and radio stations. For example a German TV and radio broadcaster is offering a lump sum payment of EUR 150,-- to composers in order to upload their music for the purpose of a late night program.[9] Composers must however certify not being member of a collective rights management society or any similar entity and have to assign the rights for the use of the uploaded music free of charge for an unlimited period.[10]

This kind of business practice is the worst outcome for music writers; especially for young composers who are deprived of growing professionally as they can't assign the rights in question to music publishers in order to have their works exploited commercially. Ironically, the same commercial entities, which request composers to upload their music under a creative commons license (with the simple purpose of avoiding paying the performing and synchronisation rights in the works in question to the respective CMO), are themselves very keen to ensure that the copyright in their broadcasts is protected and enforced.

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[8] Pierre Lalonde, Study concerning fair compensation for music creators in the digital age (study commissioned by MCNA and CIAM); see page 3, para 6

[9] Bayrischer Rundfunk requests composers submitting music for its program „Space Night" under a creative common license; see the term of condition here: http://www.br.de/fernsehen/bayerisches-fernsehen/sendungen/spacenight-english/upload/index.html

[10] Ibid

ii. What music creators want

Responsibility of intermediaries

As highlighted above (see intermediaries & social network in point i.), music is the main reason for the popularity of intermediaries such as Youtube or others. It is only fair that music should be properly valued by those who use it with the purpose of maximizing commercial benefits. Whilst it is in the natural interest of authors to have their music exploited as widely as possible, authors' exclusive rights must not be ignored or sidelined by intermediaries, irrespective of how large or powerful they may be. In offering playlists and suggesting works for users to further discover, intermediaries reproduce the work in question and communicate it to the public; the communication originates when the intermediary suggests a work to the public, who can access the respective work from a place and a time individually chosen.[11] In this regard, platforms such as Youtube must be held accountable for their acts of reproduction and communication to the public and transfer value back to those who are part of the reason for their success: creators.

The argument constantly raised by the internet lobby – intermediaries are "hosting" and providing "mere conduit" and cannot be held liable for what is carried out on their networks, using the analogy of the post man who cannot be held guilty for transporting a sealed letter containing infringing material from A to B – is insincere. Contrary to the postman, who has no knowledge about the content of the sealed letter, intermediaries are well aware about the content in question as the content is operated, processed and communicated to the public directly by intermediaries. It is therefore crucial that intermediaries accept licensing requests from CMOs in order to transfer value back to authors and respect their exclusive reproduction and communication to the public right.

Sustainable European digital music services

Whilst it is fair to say that digital music services operate in a highly competitive and difficult environment (search engines still include torrent websites offering links to pirated music), music and its authors should be more prominently valued by streaming services. One way of doing so would be to start providing users with more information of the respective work thus crediting the composer/songwriter and eventually include background information about the work in question. Providing added value for the user would eventually establish a better understanding of how music is created and the complexity of the stakeholders involved (composer/publisher, performer/record label, agents etc...).

Incontestably, the imposition of service providers to sign non-disclosure agreements with respective right holders when licensing agreements are made deprives composers and songwriters of gaining insights as to how music is valued. This practice is not helping to create a trustworthy and sustainable environment and it would be interesting to consider having similar transparency standards for digital music service providers as those which were set for the EU/CMOs with last year's directive[12].

[11] Directive 2001/29/EC, Article 3(1)
[12] Directive 2014/26/EU

Fair business practices and a ban of double standards

Requesting that young composers submit music under a creative commons license is not only unfair, but detrimental to the professional development of entire generations of music writers. The spread of such unfair and hypocritical practices as applied by some TV and radio stations (themselves content producers very keen on enforcing the copyright in their content) is certainly the worst outcome for composers of audiovisual music and must urgently be regulated. A creative commons license is irrevocable, so the composer who has, for example, given a Creative Commons Attribution License for a work which subsequently becomes a best-seller, will not be able to prevent holders of such license from continuing to exploit the work commercially.[13] It is doubtable that society will benefit and enjoy a vibrant cultural environment if the future is characterized by such an environment. Consequently, it is crucial to prohibit commercial and public entities to request authors to assign to them the right to use a work under a creative commons license.

iii. How this can be achieved

Clarification in current law and concept of associated infringement

In case directive 2001 will be re-opened, a way to ensure that intermediaries respect copyright would be to put into law a new article stating that intermediaries are not covered under the "safe harbour" provision of the e-commerce directive in so far as they are directly and indirectly involved in activities related to copyright protected material on their network.

A further idea would be to include in the EU law the concept of associated infringement, where contribution to or participation in direct infringement may be constituted by acts which assist, facilitate, incite, aid or abet the doing of an infringing act by another person.[14] As a matter of fact, intermediaries incite persons to upload materials and works protected under copyright and therefore facilitate infringement. Including such a provision into directive 2001 or any further EU law could be a helpful reference for right holders licensing their works and consequently, ensuring that value is transferred back to the authors.

More transparency, credits for creators and a EU commitment for high copyright protection standards

The commercial environment within which European digital music services operate is highly competitive. Search engines still provide access to torrent websites offering links to pirated music. A weakening of the EU copyright rules would not only create further uncertainty and generally downgrade the value of music, but would also entail that practices, under which right holders and digital music services negotiate, become even more aggressive, increasingly non-transparent and dominated by non-European repertoire. Instead, the now slowly developing and consolidating European digital music market needs a firm EU commitment for high protection standards for copyright.

Cooperation among CMOs such as the PRS, GEMA and STIM joint venture or Armonia (SACEM, Sgae, Siae) is interesting as it facilitates multi-territorial licensing and therefore increases consumer choice beyond national borders. Furthermore, industry standards should

[13] J.A.L. Sterling, World Copyright Law. Para. 12.38
[14] Ibid. Para. 13.09 and para. 13.42

be created to enable CMOs to provide certain information regarding the licensing agreement to their respective members.

Initiatives such as the cross-stakeholder dialogue “licenses for Europe” are important as they offer a forum for exchange of views and the elaboration of market led-solutions. The issue of crediting composers and songwriters more prominently in digital music services starts now to be discussed and is a concrete result of “Licenses for Europe”.

As a consequence, the music sector is more than ever in need of a firm EU commitment for high copyright protection standards. This would provide more legal certainty, which would cool down the market and allow business led solutions to develop into more sustainable, long-term digital music services.

A maintenance of the copyright law instead a recourse to creative common

Commissioner Oettinger’s address at the European Parliament last autumn stressed the importance of “fair remuneration of authors”. How can this be achieved when authors are asked to create music under a creative commons license? How can we talk about “fair remuneration” when a content producer offers a lump sum payment of EUR 150,-- for a musical work submitted under a creative commons license? It is in the interest of the EU to ban such practices, which will inevitably spread throughout Europe with detrimental consequences on Europe’s musical diversity. It would be a good start if representatives of EU institutions would avoid referring to creative commons licensees “as interesting alternatives to copyright” and start linking creative commons licensees with the problem of unfair contractual practices. More and more authors, not only in the music sector, are invited to “take advantage” of the creative commons system when contracts are signed. As authors are in a weaker bargaining position, it will be hard to bargain for them to have a ‘normal’ assignment of right under copyright. Regrettably, a recent study[15] of the European Parliament, which very comprehensibly elaborated the problem of unfair contractual practices, did barely elaborate on the problem related to creative commons licenses.

In this regard, it is of paramount importance that copyright as a legal regime for authors is strengthened and perceived as a natural right of authors in Europe. Commercial and public entities should be prohibited by law to request authors to assign the right to use a work under a creative commons license.

Conclusion

Did the copyright regimes in Europe serve their purpose, namely and irrespectively of their conceptual background, in providing a legal system under which authors can create works for the benefit of society? It seems fair to say that yes, they did. Europe’s cultural sector is one of the most vibrant in the world[16] and diversity in repertoires and languages is one of the cornerstones of Europe’s identity. Copyright as the law of the arts is indisputably the pillar of the success story and it would be erroneous to weaken it because of a digital fever. As a

[15] Contractual arrangements applicable to creators: law and practices of selected member states. European Parliament, Committee for Legal Affairs. 2014

[16] See for instance the economical significance of the cultural and creative sector in the EU with revenues of EUR 535.9b and providing work for 2.5 times more people than automotive manufacturers (ref: EY Study, Measuring cultural and creative markets in the EU. December 2014)

consequence, this paper developed three major arguments in order to foster the remuneration of authors in the context of the review of the EU copyright acquis. Firstly, intermediaries directly engage in an act of reproduction and communication to the public when, for instance, a video streaming platform suggests further works to be discovered by the user and reproduces a work within its system. It is submitted that the EU legislator should clarify that intermediaries are not covered under the "safe-harbour" provision of the e-commerce directive and that the concept of associated infringement should be introduced into EU law. Secondly, whilst music streaming services seriously under-valued music, a weakening of the EU copyright acquis would have a disastrous impact on the sector. The practices under which the different stakeholder groups operate would become even more obscure and non-transparent to the ultimate detriment of composers and songwriters. Thirdly, the miss-use of the creative common system by commercial *and* public entities hinders the professional development of composers and songwriters and should be prohibited.

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