

FAIR REMUNERATION FOR AUTHORS IN THE DIGITAL AGE

Position paper

This paper presents the proposals of professional music creators active in Europe today to ensure fair remuneration of authors in the digital age.¹

1. MODERNISATION OF THE EUROPEAN FRAMEWORK FOR COPYRIGHT

A review of Directive 2001/29/EC would be a unique opportunity to modernise the EU copyright framework to ensure fair remuneration for authors. It should remedy the following existing weaknesses:

- In intellectual property law by recognising strong harmonised moral rights to overcome the repeated violations of moral rights online, especially the right to be identified as the author and the right to prohibit the distortion of a work;
- In contract law by ensuring the structurally weak bargaining position of authors is remedied;
- In electronic commerce law by narrowing the scope of application of the safe harbour provisions contained within the E-Commerce Directive 2000/31/EC which, in their current form cause unintended consequences by depriving authors of fair online remuneration.

Proposal 1: A revised Infosoc Directive should guarantee the protection of the exclusive rights of authors to ensure fair remuneration.

Proposal 2: A revised Infosoc Directive should prescribe that providing the access to copyright protected content is an act of communication to the public, and that online music platforms are not exempt from the obligation to compensate such communication.

Proposal 3: Contractual relations must be regulated² to balance the bargaining position between the author and other parties to a contract.³ In addition individual authors should be represented by societies to counterbalance the market power of big international players.

Proposal 4: Moral rights must be recognised at European level.

¹ See Annex 2 for a definition of the terminology contained within this position paper.

² As recommended by *Mission « Acte II de l'exception culturelle », Contribution aux politiques culturelles à l'ère numérique*, Pierre LESCURE, Mai 2013, p.232

³ As recommended by the study published by the European Parliament in 2014, "*Contractual arrangements applicable to creators: law and practice of selected Member States*". These standards should include e.g. the mandatory determination of the exact scope of the transfer of rights, they should prohibit the assignment of future (unknown) uses, establish a clear division between digital and other forms of exploitation, prohibit clauses such as the assignment of rights for uses "in all technologies, and those yet to be invented"...

2. ROYALTY AND ADVERTISING INCOME: A FAIR SHARE FOR AUTHORS

Current weaknesses have a cumulative effect on the remuneration of authors:

- Advertising income paid to creators with all online music platforms, particularly with streaming services is unacceptably small or sometimes non-existent;
- Music is undervalued by online music platforms;⁴
- The revenue split between right holders is inequitable to authors (see Annex 1).

In combination with legally binding steps, in particular in the context of the review of the EU framework for copyright, EU policy-makers should legislate to include “fair trade” initiatives and provide incentives for online music platforms to achieve the following objectives:

Proposal 5: The split of gross royalty income paid out by online music platforms to authors must be increased.

Proposal 6: Advertising income paid to music creators by online music platforms must also be significantly increased.

3. TRANSPARENCY IN THE COMMERCIAL MUSIC VALUE CHAIN

The general lack of transparency in the music value chain is detrimental to authors. This is a matter of competition and market efficiency which EU institutions should regulate. Points to note are:

- Record labels (labels) negotiate ownership positions in the online music platforms they bargain with, receiving advances from them, 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.⁵
- Online music platforms insist that contracting parties (including labels, publishers and CMOs) make contracts under NDAs, thereby preventing them from sharing with their own authors the rates achieved for their works.
- The commercial environment within which these activities occur should also be regulated to make it fairer. Although a full disclosure of NDAs would be ideal, an industry standard should be created to enable authors to have access to as much information as possible. Contracting parties should have an obligation to disclose an indicative price or percentage bracket within which their agreed terms are situated.
- To achieve this transparency the obligations of CMOs to provide their members and the public with information about rights, tariffs and revenues (Articles 18-22 of Directive 2014/26/EU⁶) should be supplemented by also recognising comprehensive audit rights for authors in respect of labels and publishers.

Proposal 7: Conflicts of interest must be declared at the outset of the negotiation between online music platforms and labels and CMOs.

Proposal 8: The use of NDAs imposed by online music platforms to labels and CMOs must be strictly limited.

4 See e.g. “Study concerning fair compensation for music creators in the digital age”, Pierre-E. Lalonde, October 2014, CIAM / MCNA

5 See 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

6 DIRECTIVE 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

4. ACCURACY OF DATA PROVIDED BY ONLINE MUSIC PLATFORMS

Accurate data are a precondition to ensuring the distribution to authors is of the correct amount.

- Directive 2014/26/EU rightly notes that „*Relevant data that are required for the efficient collective management of rights should also be provided by users*“. However there is very little in the Directive to support this objective.
 - There are concerns that data provided by online music platforms to collective management organisations (CMOs) are often inaccurate, leading to reduced payments to authors. Not only is accurate reporting important to guarantee that authors' income stream is not adversely affected, it is also important in terms of moral rights (i.e. the recognition of ownership).

Proposal 9: Online music platforms should be required to provide comprehensive and accurate data to CMOs.

5. EFFECTIVE STEPS AGAINST ONLINE COPYRIGHT INFRINGEMENTS

Digital players, including online music platforms, possess the technical abilities and know-how to effectively counter the online copyright infringements which directly impact the remuneration of authors.

Proposal 10: Auto predictive fill-in of illegal content with internet search engines should be removed.⁷

Proposal 11: Illegal content should not be returned in search results.

⁷ This is important for Google searches and alert services, which often highlight illegal downloading websites.

ANNEX 1:

How much do music creators receive per download and per spin?

Due to the lack of transparency, it is difficult to assess how much music creators earn per download or per spin. Recent studies commissioned by national governments in Europe report the following figures:

- Streaming (example): “Renown Finnish artist Kela revealed in 2013 that he received \$ 0,00049 (rate for ad-supported subscription) and \$ 0,0055 (rate for paid subscription) per spin on Spotify”.⁸
- Streaming: “The artist is remunerated on average € 0,0001 per spin for a free service financed by advertising and € 0,004 per spin for a subscription-based service”.⁹
- Download: “The total remuneration per song for an album featuring 10 songs would reach 0,02 € in the best case scenario et and can be significantly lower than 0,01 € due to the combined effects of various deductions”¹⁰.
- Download: “An artist receives on average 0,04 € for a song paid 1,29 € by a consumer on a digital download platform”.¹¹

ANNEX 2:

Definitions

- The term ‘author’ is here understood in its broad interpretation according to Article 1 Berne Convention for the Protection of Literary and Artistic Works 1886 and as including authors, writers and composers, and other music creators.
- ‘Online music platforms’ is used here to encompass all digital actors including content hosting services and other such intermediaries.
- ‘Fair remuneration’ is understood as the author’s exclusive rights meaning the author’s entitlement to a share of the income generated by their work. Fair remuneration is a split which is fairer to the author, non-exploitative, and rightfully recognises the composition.

8 Source: rapport Pheline

9 Source: Mission LESCURE, p.232

10 Source: rapport Pheline, p.59

11 Source: Source: Mission LESCURE, p.232