

ECSA Position on the Copyright Directive

Interinstitutional negotiations

15th October 2018

Following the successful adoption of the European Parliament position on the Copyright Directive, the European Composers and Songwriters Alliance (ECSA), which represents over 50,000 professional composers and songwriters in 25 European countries, **would like to thank again the European Parliament for standing behind creators and reiterate its strong support in favor of the Copyright Directive.**

Together with all European creative and cultural sectors, we believe that it represents a unique opportunity to promote a fair internet for all players and sustainable jobs for European creators. Millions of them do not get any information nor a fair share from the exploitation of their works, notably online. A few months before the next European elections, the EU can now seize this once in a decade opportunity to deliver concrete improvements to creators and address their systemic weak bargaining position in contracts. Such overarching principles are supported by an overwhelming majority of citizens in the EU and by [more than 130 authors' organizations](#) across Europe.

In order to achieve those objectives during the interinstitutional negotiations, ECSA calls on the European Parliament, the Council and the European Commission to support:

- i) [a strong principle of fair and proportionate remuneration](#)
- ii) [a high level of transparency obligations,](#)
- iii) [an effective dispute resolution mechanism](#) and
- iv) [a right of revocation to the benefit of creators, fair competition and cultural heritage alike.](#)

We also strongly support tackling the “transfer of value” problem. Article 13 can greatly contribute to create a fair and sustainable digital single market for creators, while offering wider legitimate choices for consumers.

Chapter 3 (Fair remuneration for Authors and Performers)

Article -14a: Principle of fair and proportionate remuneration (EP amendment)

This Article establishes a much-needed guiding principle of fair and proportionate remuneration for authors and performers for the future implementation of the Directive. It leaves enough flexibility to Member States to implement it and consider the needs of different sectors.

Article 14: Transparency obligation

There can't be any fairness without transparency. Article 14 lies at the heart of the “transparency triangle” and should promote “a high level of transparency”, considering “the relative importance of each contribution” (EP position). We therefore **support clear obligations** and **reject any exception for non-disclosure agreements** (provided in the EP position) **that can only benefit big players** (to the detriment of smaller ones) **and defeat the whole purpose of Article 14.**

The Digital era offers unique tools and opportunities to provide accurate and comprehensive information to creators about the exploitation of each of their works. However, authors have very often no access to any information. This Directive should promote the use of those tools to provide accurate and comprehensive information to authors. There is no technical nor legitimate reason for the online world to be less transparent than the offline world. In addition, this Article does not require the disclosure of new information. Contractual partners of authors are obliged due to fiscal and accountancy rules to keep and store information about the exploitation of the works.

Paragraph 1: We support timely (“**at least once a year**”), “**accurate**” and “**comprehensive**” information that would cover “**direct and indirect revenues**”, including for “**successors in title**”.

Paragraph 1a: We support the **obligation for sub licensees** to share all information with the licensee (EP position).

Paragraph 1a, sub-para 2: We fully support **the first sentence of the EP amendment but we strongly oppose the exception for commercial sensitive information and non-disclosure agreements which would only encourage malpractice by developing non-disclosure agreements along the licensing chain.**

- The end-result would not only bring more opacity to the overall value chain and be detrimental for all creators but also create a distortion of competition. Article 14 does NOT aim at creating horizontal transparency between potential competitors, but at providing vertical transparency along the copyright value chain to create a fair negotiation environment for creators. This does not hinder the confidentiality of business agreements as it only concerns the much-needed sharing of information on exploitation results between rightsholders of the same work.

Paragraph 2, 3 and 3a: We support a “**high**” **level of transparency**, the EP **deletion of paragraph 3** (no carve-out for non-significant contributions, but obligation to take the importance of any contribution into account in paragraph 1), and the reference to **collective bargaining agreements**.

Article 15: Contract adjustment mechanism

ECSA welcomes the contract adjustment mechanism as it provides a new tool creating more fairness in how benefits from the exploitation of copyright-protected works are shared with creators. We therefore welcome the EP amendment, which includes clear provisions (with the terms “**claim**”, “**fair**” remuneration, “**direct and indirect**” revenues).

Article 16: Dispute resolution mechanism

We support amendments which provide that “**representative organisations of authors and performers may initiate such procedures**” but we believe that “including **collective management organisations**” (in Article 16 of the Council’s text and in recital 43 in the EP position) is not warranted nor necessary since CMOs are not necessarily representing only authors and performers but also their contractual counterparts in certain sectors (as in the music sector).

Article 16a: Contractual provisions (Council text)

We fully support this provision, which would guarantee that the law supersedes contracts, which are unfair to the overwhelming majority of authors across the EU.

Article 16a: Right of revocation (EP position) – See also full briefing and flyer enclosed.

Several EU Member States and certain third countries (such as the US) already grant to authors the possibility to claim back their rights in case they can prove that the publisher is not exploiting their works (“right of revocation” or “rights reversion mechanism”). **We fully support this right** (as adopted by the EP - new Article 16a) which would benefit authors but also encourage fair competition and citizen’s access to our common cultural diversity and heritage. **Linked to Article 14, it would serve as an efficient compliance mechanism to ensure the application of the transparency provisions set out in Article 14.**

Authors have very little room to maneuver when negotiating contracts, which are very often concluded for the entire duration of the copyright term and for all territories of the world. The duration of authors’ rights (70 years after the death of the author) and the duration of transfer (contracts between authors and publishers) are two entirely different concepts. The term of protection, as laid down by international and European law, was intended “to provide protection for the author”, not to lock unexploited authors’ work in the hands of publishers. With the digital era and the rapid evolution of the music sector, contracts for the entire term of copyright prevent music authors from both considering the different and dynamic modes of exploitation and taking back their rights in case the publisher does not exploit the works correctly or does not provide information to the author. It is obvious that such duration is detrimental to authors, in a context where the revenues’ streams generated by digital exploitation could not be foreseen by the music author when he signed a contract decades ago.

Introducing a right of revocation would result in a win-win situation for everyone. It would **benefit:**

- 1) Authors** – by preventing that their hands are tied if their works are no longer being exploited.
- 2) Consumers, and fair competition.** If a publisher is inactive, the author would have the possibility to publish his or her work on his or her own or offer it to another publisher.
- 3) Cultural diversity since it would “unlock” works that are not exploited.** Unexploited works (especially niche and regional music, literature and audio-visual works) could get re-published and become widely available. This would greatly benefit cultural diversity and our immense cultural heritage across the EU.

Article 13: Transfer of value

Unfortunately, authors have been greatly deprived of fair remuneration for the exploitation of their works by online services, whilst – paradoxically – their creative efforts are the reason for the popularity and financial success of online services.

We therefore welcome the fact that the European Parliament, the European Commission and the Council have all supported tackling the transfer of value and rebalance this unfair current relationship between rightsholders and online sharing content service providers. However, we would like to **express our concerns on Article 13.4 of the Council text, which provides far-reaching liability exemptions, and on Article 2 of the EP position**, which unjustifiably excludes so-called small enterprises (which form a significant part of the entire online market) entirely from the scope of any remuneration or liability, on the other hand. Therefore, we encourage the three European Institutions to finally agree on a robust text that fully addresses this critical issue for creators and establish a fairer level playing field for those who create and invest in artistic works.