ecsa european composer & songwriter alliance

EC draft proposal for a Directive on Copyright in the Digital Single Market and related issues

– Point of view of Europe's Music Creators –

ECSA is the representative body of composers, songwriters and lyricists of all music genres in Europe, regrouping over 50 national associations of music creators in 25 European countries. The main objective of the alliance is to defend and promote the rights of music writers at the national, European and international levels 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.

ECSA is one of the five members of the Authors' Group[1], Europe's widest alliance of creators, including composers, songwriters, journalists, film/TV directors, screenwriters, writers and translators.

This paper provides a detailed background on the ECSA position regarding the recently proposed Directive for Copyright in the Digital Single Market and related issues. It outlines the views of music writers and sets out concrete propositions how to ameliorate the text in order to fully match its' objectives.

In summary, it sets out:

i) Why the proposed Copyright Directive must be welcomed

ii) The music writers' views on the provisions suggested in the directive

iii) Conclusion

[1] Members of the Authors' Group are: ECSA, EFJ (European Federation of Journalists), EWC (European Writers' Council), FERA (Federation of Film Directors in Europe), FSE (Federation of Screenwriters Europe)

Introduction

ECSA believes 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 and nothing to drive the growth of creative industries and 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, inspiration and talent; it is the result of a process necessitating time and, in particular, hard labour. It is crucial that representatives of EU institutions acknowledge the interest of authors in maintaining a strong legal regime, which protects and provides mechanisms for authors to maintain control over the exploitation of their works. A set of strong exclusive rights and mechanisms for fair contracts with those to whom authors assign their rights is therefore fundamental: it strengthens the position of authors and ensures fair remuneration, which in turn results in more creative works to be exploited and marketed.

i) Why the proposed Copyright Directive is welcomed

Introducing the Copyright Directive in the European Parliament on 14 September 2016, European Commission President Juncker said, *"I want journalists, publishers and authors to be paid fairly for their work, whether it is made in studios or living rooms, whether it is disseminated offline or online, whether it is published via a copying machine or commercially hyperlinked on the web."*[2]

ECSA believes that the words of President Juncker fairly reflect the main provisions suggested in the draft directive. As insinuated above, creating a musical work – irrespectively of the genre of music – is the result of an authorial process, which requires time, creativity, judgement and labour. Therefore, ECSA is pleased that the EC opted for a targeted approach, identified problems in the market and proposed tailored solutions. Whilst ECSA is aware that the directive also reflects the necessity to strike a compromise among various conflicting parties, i.e. authors / right holders / tech companies / users, the community of the cultural sector, including representatives of performers, must recognize that the EC finally decided to side with Europe's cultural and creative sectors. ECSA welcomes this high-level political decision and appreciates that the EC resisted strong pressure from foreign internet companies lobbying for further exceptions to exclusive rights, particularly with regards to User Generated Content.

Taking this into account, ECSA opted to support the proposition of the Copyright Directive[3] as it favours the cultural and creative sectors. For the first time in the history of copyright law making on European Union level, the crucial issue of contractual remuneration of authors and performers is addressed. Nonetheless, the devil is in the details and some of the provisions in the text must be amended in order to meet their objectives. The text also addresses issues directly linked to the relationship between music writers and publishers and

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[2] President Juncker, State of the Union 2016, European Parliament on 14 September 2016
[3] Authors' Group Statement on EC copyright proposal, 14 September 2016

clarifies uncertainty in the application of copyright law after CJEU rulings and court decisions on national law, referring to distribution of funds collected through CMO's and distributed to authors and publishers. These issues make it difficult for some stakeholders, such as CMOs, to truly reflect the views of composers and songwriters because their membership also contains publishers. Having this in mind, ECSA believes the independent view of music creators is essential and must therefore be given due consideration by EU policy-makers.

ii) Music creators' views on some of the provisions suggested in the directive

a) Title II, Article 4: Use of works and other subject-matter in digital and cross-border teaching activities

ECSA welcomes the provision but has two observations:

- Subparagraph 1(b) conditions that the illustration for cross-border, digital teaching shall be accompanied by the indication of the source, including "the author's name unless this turns out to be impossible". ECSA opines that the provision not to mention the name of the author in the event of "impossibility" sets out an exception to authors' attribution right and conflicts with article 6bis of the Berne convention and common practices in academic literature; references to another article must include the source and the author's name of the said article, otherwise the reference is not valid and the accuracy of the reference cannot be certified. The reference to impossibility of finding the author's name shall therefore be deleted and the source, *including the author's name,* must be stipulated for the cross-border, digital teaching activity.
- Subparagraph 4 sets out that Member States *may* provide for fair compensation for the harm incurred for *right holders* due to the use of their works pursuant paragraph 1. ECSA opines that Members States *shall* provide for fair compensation for the harm incurred for *authors* in order to create a fair level playing field for *all authors* in the single market. There are no arguments as to why some authors should receive fair compensation in some Member States and not in others in an EU single market..

b) Title III, Article 7: Use of out-of-commerce works by cultural heritage institutions

The provision of extended collective licensing, i.e. that a license may be presumed to apply to right holders of the same category as to those covered by the license who are not represented by the collective management organisation, appears to be a pragmatic solution and is welcomed. The provision also includes an opt-out mechanism for authors, if the latter, who are not members of CMOs, wish to have their rights excluded from the licensing activity. However, authors will only have the ability to effectively use the opt-out mechanism once they are duly informed that their rights are used in the license. As the CJEU recently assessed[4], authors have the exclusive right to authorise or prohibit the reproduction or communication to the public of their works. The prior consent of an author to the use of one of his works can, under certain conditions, be expressed implicitly. According to the CJEU, for the existence of such consent to be accepted, "every author *must be informed* of the

[4] Soulier and Doke, C-301/15

future use of his work by a third party and of the means at his disposal to prevent it if he so wishes."[5]. Taking this into account, ECSA believes that the extended collective licensing mechanism must reflect the CJEU ruling and it must ensure that every author covered by the extended collective licensing is properly informed. ECSA therefore proposes to complement article 7 with the introduction of an information requirement for respective CMOs to duly inform authors who are not members of the said CMO, that their works and rights therein are covered by the license. When the information is transmitted to the authors, the CMO shall also outline the necessary steps to be undertaken for opting out of the license.

c) Title IV, Article 11: Protection of press publications concerning digital uses

ECSA has difficulties to understand the legal reasoning of the introduction of a new, related right for press publishers with regards to the reproduction and making available to the public of press publications on digital uses. In terms of copyright law, it is questionable what justifies the introduction of such a right. Whilst recital 32 sets out that the "organisation and financial contribution" needs to be recognised, it is at best unclear how 'organisational and financial contribution' can provide the legal basis for a set of exclusive rights lasting for 20 years after the date of the publication. Authors have exclusive rights because of their intellectual effort and labour of mind in creating original works of art. A work, irrespectively of whether it is a literary or musical work, reflects the authors personality. It is the inherent link between the work and the author which justifies exclusive economic and moral rights. The introduction of a new right due to the organisational and financial efforts is ambiguous as it strongly departs from the key concept of copyright law -- *authorship and originality* -- as a legal cornerstone of exclusive rights. In this regard, ECSA fears that Article 11 weakens copyright as a legal regime for authors, as it will inevitably be perceived by consumers as a corporation right, alienating and departing from the key conceptual principles of authors' rights and copyright.

Taking this into consideration, ECSA opines that instead of introducing a new right on weak legal and conceptual ground, which in turn weakens copyright as a legal regime of authors, EU policy-makers should tackle the liability of ISPs and news aggregators (as timidly done in recital 38 and article 13 of the directive). Once it has been clarified that,(i) the communication to the public right must be interpreted broadly (i.e. in the sense that a public is composed of people who go beyond the normal circle of a family and social acquaintances) and (ii) that ISPs and online platforms do engage under certain conditions in acts of communication to the public (and reproduction of the said work), authors and their publishers will jointly benefit from new online revenues.

d) Title IV, Article 12: Claims to fair compensation

Following the CJEU ruling in *Reprobel*[6] and the German court decision in the *Vogel*[7] case, which, in essence, deprives publishers of the possibility to claim compensation for the harm caused under an exception for private copying and more generally, questions the status of publishers as right holders, uncertainty prevails with regards to the legal status of publishers in both EU and German copyright law and the application thereof. ECSA therefore supports article 12 under two conditions: Firstly, the article has to be amended in such a way that it clarifies that the publishers' share is defined by the governing instances of the respective CMOs and distributed to publishers within the network of CMOs. Secondly, article 15 of the

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[5] Ibid.
[6] CJEU - C-572/13
[7] German Federal Court - I ZR 198/13

same title needs to be complemented with the introduction of a new rights reversion mechanism allowing authors to regain their rights under certain conditions as detailed below.

e) Title IV, Article 13, Recital 38: Certain uses of protected content by online services

Regrettably, 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. The exclusive right of reproduction and communication to the public is ignored with the argument that intermediaries are covered under the "safe-harbour, article 14" provision of the e-commerce Directive. Yet it is evident that these platforms are doing far more than "hosting" works: they provide user-friendly music playlists and engage 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).[8] It is clear 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. For this reason, article 2 and 3 of the 2001 Infosoc directive should be fully enforced.

Consequently, ECSA welcomes recital 38 as a first step to help clarify whether online services are covered by article 14 of the e-commerce Directive. However, as insinuated above, online services not only communicate works to the public, but also engage in an act of reproduction (through internal storage and copying works on playlists). ECSA therefore believes the text of the directive also should refer to the act of reproduction undertaken by certain online services.

ECSA would advocate formulating the content of recital 38 in a new article in order to ensure the strongest possible clarification and to avoid lengthy and costly court trials.

With regards to article 13, the following observations should be noted: once right holders have agreements with online services in order to effectively benefit from content recognition technologies, right holders must have an obligation to provide the same tools to the undersigned music creators, in order for the latter to be able to make full use of these tools (especially the intelligence gathered through analytics).

f) Title IV, Articles 14, 15, 16: fair remuneration in contracts of authors and performers

ECSA has been actively advocating for fair contractual practices in association with the Authors' Group, which ECSA proudly initiated in the course of 2015. In this respect ECSA's position with regards to articles 14, 15 and 16 is aligned and coordinated with the Authors' Group; concrete amendments tabled by the Authors' Group can be found in annex to this paper. However, the following segment complements the Authors' Group position and provides a more *music-centric* analysis as to why the mechanisms in the directive are welcomed and how they can be improved for the benefit of composers and songwriters.

Article 14, 15 and 16 are conceptually connected and perceived as the "transparency triangle". The basic idea is that given the transparency on revenues generated, authors will have more information on the exploitation of their works and therefore be able to claim additional remuneration in case the originally agreed remuneration is disproportional

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[8] For instance, the streaming service YouTube suggests to users similar works to the one users are currently watching or listening to;

compared to the benefits and revenues generated out of the exploitation of the work. An alternative dispute resolution mechanism (art. 16) shall facilitate dispute settlements in case of disputes arising under article 14 and 16.

ECSA considers the maintenance of the EC proposition as an absolute minimum to address the problem of fair remuneration in contracts. But in order to meet the objective of fair contractual remuneration and to create a fair level playing field for all creators in Europe, the directive should harmonize *level up* as some countries, such as Germany and the Netherlands, have far more elaborated contractual remuneration mechanisms than those suggested in the draft directive. Furthermore, in the context of an EU single market there is no reason why creators in some Member States should enjoy more rights than in others. Not addressing this problem hinders free movement of creators' services and the latter's ability to make full use of the creators' rights.

g) Title IV, Article 14: Transparency obligation

ECSA welcomes a mandatory transparency obligation for those whom authors have transferred their rights to. It is essential that music writers are fully informed on how their rights have been exploited by publishers, including which benefits and revenues have been generated thereof.

However, as music writers assign their rights in continental Europe exclusively to CMOs, the latter licensing on behalf of writers and publishers, the transparency obligation will provide new information on publishers licensing activities *outside* the licensing activities of CMOs, i.e. rental of scores for public performance, merchandising, eventually synchronisation rights etc.

The transparency obligation will benefit UK composers and songwriters[9] as the latter usually transfer the mechanical rights via contract to publishers, who in turn license the mechanical rights directly to DSPs (Spotify, SoundCould etc.), at terms unknown to music writers. The transparency obligation will shed light on possible non-distributed advance payments and equity shares obtained by some publishers in the licensing agreement with DSPs, a practice the music writers' community strongly opposes as these payments are usually not shared with music writers.

In order to be truly beneficial for continental music writers, the transparency obligation must contain a disclosure of the activities undertaken to *promote the exploitation of the rights and the music writers* therefore. Promoting composers and songwriters is the raison d'être of publishers, justifying the publishers' share assigned to publishers by music writers for the CMO distributions.

However, given the information ECSA received from music writers throughout Europe, publishers often lose interest in promoting their music writers, ignore requests from the latter and simply continue receiving their share from the CMO distribution. ECSA therefore proposes to include an obligation in article 14 to disclose activities undertaken by the publisher to promote the undersigned music writer.

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[9] Under the condition that the UK will implement the Copyright Directive into national law.

h) Title IV, 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. Similar to the transparency obligation, UK music writers will be the first to benefit from this mechanism, as it will be easy for them to assess (on the basis of the new transparency requirement) whether the revenues and benefits generated by the publishers through exploitation of the mechanical rights are disproportional compared to originally agreed remuneration.

However, the contract adjustment mechanism must be complemented with a rights reversion mechanism allowing music writers to claw back their rights in the following situations: (i) insufficient exploitation, (ii) lack of foreseen remuneration, and (iii)insufficient or lack of regular reporting and promotion. For instance, composers and songwriters in Germany benefit from such a right. As stipulated above, the EU should harmonise *level up* and ensure that composers and songwriters, and all other creators in Europe, benefit from the same rights as German authors. A harmonization will create a level playing field for all authors to the benefit of transnational mobility, diversity of repertoires which will in turn lead to the exploitation and marketing of more musical and other creative works.

iii. Conclusion

The Copyright Directive proposed on 14 September 2016 by the European Commission is a 'once-in-a-generation-occasion' to address a couple of problems of key importance for creators and the cultural and creative sectors. Ensuring that value is fairly shared throughout the value chain is of key importance for the cultural and creative sectors. Therefore, ECSA respectfully urges Members of the European Parliament and Council to properly review the draft directive in light of the concerns and arguments outlined above. ECSA is convinced that in order to continue strengthening and developing the EU single market – and the Digital Single Market in particular – the proposed directive on copyright offers the potential to safeguard and further strengthen the European cultural sector to the ultimate benefit for EU citizens, cultural diversity and democracy in general.

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