Digital Services Act package

ECSA's response to the open public consultation

The European Composer and Songwriter Alliance (ECSA) represents over 30,000 professional composers and songwriters in 27 European countries. With more than 60-member organisations across Europe, the Alliance speaks for the interests of music creators of art and classical music (contemporary), film and audiovisual music, as well as popular music. The main objective of the Alliance is to defend and promote the rights of authors of music at the national, European and international levels and improve social and economic development of music creation in Europe.

Introduction

ECSA welcomes the opportunity to contribute to the European Commission's public consultation on the forthcoming Digital Services Act (DSA) package. This position paper summarizes and complements ECSA's formal response to the public consultation's questionnaire but does not limit itself to the issues mentioned in the public consultation. We note that the Digital Services Act focuses on two main pillars[1] and we welcome the overall intention to increase the responsibilities and oversight of online platforms and to promote ex-ante rules for large platforms acting as gatekeepers.

The e-Commerce Directive, which provides the general legal framework for online services in the Internal Market, was adopted 20 years ago when Internet was still in its infancy. It has introduced rules which have permitted the rapid development of online platforms in the EU. Since then, while the overall digital revolution has permitted citizens to access cultural content as never before, the lack of EU action and harmonization have also enabled those platforms to benefit from a framework which lacks fairness and accountability for creators. For composers and songwriters who already faced precarious working conditions and unstable income, this digital shift has

[1] "*First, a proposal of new and revised rules to deepen the Single Market for Digital Services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms' content policies in the EU. Second, ex ante rules to ensure that markets characterised by large platforms, remain fair and contestable for innovators, businesses, and new market entrants*". DSA Public consultation

led to a decrease of revenues since most online platforms do not remunerate music authors in a sustainable manner. To put it bluntly, exposure is nice, but it does not pay the bills.

Overall, the damaging impact of certain large online platforms on fundamental rights (the right to property, privacy) and public policy values (fair competition, cultural diversity, fair taxation) are numerous and should be taken into account by policy makers when they devise more stringent, modern rules to increase the responsibilities of platforms within the Digital Services Act.

Moreover, while the EU framework was meant to enable the development of numerous competing online platforms, we note with satisfaction that the European Commission now recognizes that the lack of regulation and appropriate competition tools have also permitted the domination of the online sphere by a few large non-European players with significant network effects and acting as gatekeepers. There is no time to lose nor to be naïve about the impact of those dominant online platforms on our societies. More stringent rules are needed to promote a fairer, competitive, and more responsible online environment.

With the adoption of Article 17 of the Directive on Copyright in the Digital Single Market[2] adopted in 2019, the EU has started to recognize that specific rules should apply for "online content sharing service providers" which give the public access to a large amount of copyright protected works uploaded by its users, which it organises and promotes for profit-making purposes. This Directive now clarifies that those services perform an act of communication to the public or an act of making available to the public and must get a license to remunerate creators and other right holders for the use of their works.

ECSA strongly supports the Copyright Directive and in particular this provision which should be implemented in a timely and ambitious manner, with a view to strengthen the ability of European creators and other right holders to create works and invest in new and diverse content across Europe. We strongly caution against putting into question this provision, which constitutes a first step towards a fairer and more responsible online environment for the use of copyrighted works by online content sharing service providers.

Articles 18 to 23 of the Copyright Directive are also key provisions, which must be respected by all relevant online platforms along the value chain to ensure that authors are duly informed about the exploitation of their works and can benefit from a proportionate remuneration for the use of their works.

[2] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.)

Other important EU Directives and regulations have been adopted in the last two years, notably the AVMS Directive[3] and the platform to business regulation[4]. They also go in the right direction with more stringent rules for the promotion of European works on certain online platforms and with increased transparency.

As the DSA's Impact Assessment rightly mentions, the DSA should be coherent with those sector specific regulations and not intend to modify them. We believe that the DSA should lead to stronger liability regime for online platforms rather than creating more safe harbors – which can have important negative impacts on fundamental rights, EU values and objectives, such the promotion of cultural diversity.

Last but not least, ECSA also welcomes the European Commission's focus on the situation of freelancers and self-employed in the online and offline environments. Today, due to the current legal uncertainty and certain decisions taken by national competition authorities, music authors are often prevented from engaging into collective bargaining agreements which could very much improve their precarious working conditions (for example through standards contracts or minimum rates). With the Directive on Copyright in the Digital Single Market, EU law now clearly encourages collective bargaining agreements to improve the weak bargaining position of individual authors with their contractual counterparts. We call on the European Commission to ensure that the interpretation of competition law by national competition authorities do not prevent music authors to engage into collective bargaining agreements. Those collective bargaining agreements can greatly improve the precarious working conditions and the poor remuneration that music authors face today.

1. Addressing copyright infringements and unlicensed platforms

Despite the very rapid growth of licensed digital music services in the last 20 years, and the relative decrease of music piracy, the number of copyright infringements and unlicensed platforms remains an important issue for ECSA.

ECSA itself is not directly protecting the works of its individual members online through notices or judicial proceedings. However, a wide majority of its individual members assign their works to national collective management organisations, which themselves protect the works of their repertoire, notably online. As a result, ECSA has a keen interest in making sure that copyright can be properly enforced, and to reduce the number of infringing websites and offers that are still numerous in the digital world.

In that regard, we believe that the European Commission should both enforce existing laws that aim at fighting copyright infringements and address the following structural challenges that still hinder the ability of creators to efficiently protect their works:

- First of all, the IPRED Directive as well as Article 8.3 of the InfoSoc Directive have still to be implemented in all Member States to provide meaningful enforcement and

[3] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities

[4] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance)

the effective application of injunctions. In today's EU single market, it should also be possible to provide a cross border effect to injunctions in relation to the same illegal businesses. Today, relevant right holders and CMOs need to engage into costly and lengthy legal actions Member State by Member State.

- It is very hard, not to say impossible, for individual music authors but also for CMOs to monitor all platforms which make available illegal content. As a result, we support a "duty of care" principle for all services which can be used to infringe copyright. Such a principle should require all intermediaries (such as search engines, ISPs or payment providers) to exercise their due diligence to prevent their customers to engage in illegal activities. Those intermediaries should also be required to inform their users about the need to respect copyright and to use appropriate efficient content-identification measures. From a general standpoint, online intermediaries should stop their relationship with operators which engage in illegal activities on a repeated basis.

- The current notice and take down procedures are impossible to handle for individual music authors but also impracticable for many collective management organisations which do not have the means nor resources to constantly monitor the illegal use of copyrighted works online. When they make those efforts, it only leads to very limited results since, in any event, illegal works are most often back online where a notice has been sent. As a result, we support a "notice and stay down" system, which means that online intermediaries should not only remove the notified work but also identical copies and prevent the re-appearance of the same work online.

- The liability regime needs to be improved with a clarification between active and passive hosts, in light of the CJEU case law. The promotion, organisation, and recommendation of content should qualify digital services as active and therefore trigger their liability.

Last but not least, the EU must address the fact that structurally infringing websites hide in anonymity and do not respect the information duties of Article 5 of the E-Commerce Directive, with harmful consequences for creators, other rightholders and users. Those illegal services should not be able to use legitimate EU intermediary service providers for infringements. To address this situation, we support the implementation of effective Know Your Business Customer (KYBC) policies: intermediary service providers should have a duty to receive and verify customer data before making business. Such KYBC duties should not only be imposed on hosting providers, but also on other intermediaries to fight against structurally infringing websites and illegal business models.

2. Addressing the lack of transparency and promoting diversity online

As noted by the European Commission in its impact assessment, the power and market share of certain big user generated platforms (such as YouTube) and big music streaming services has become so important that they benefit from significant network effects and often act as gatekeepers for creators and rightsholders. Composers and songwriters as well as other rightsholders often do not have a choice but to make sure

that their works are made available by those platforms if they want to get sufficient exposure.

Those platforms and the way they operate can have a huge impact on consumer choice and cultural diversity. Playlists and recommendations powered by AI algorithms are one of the main tools used to maximize revenues in favor of major streaming platforms and one of the main avenues for European citizens to watch or listen to online. However, those platforms and the tools that they provide (playlists, recommendations, and content identification systems) for pure commercial reasons are far from transparent and thus there is no possibility to establish their fairness and distortive effect.

Most often, authors and other rightsholders (as well as public authorities and regulators) are in the dark and do not receive sufficient information on data uses, playlists, recommendations, and on the role of AI algorithms for those uses. Today, transparency reports are partial, made on a voluntary basis, and difficult to compare across services.

In addition, when major streaming services engage in both their own content production and the distribution of third-party content (such as Netflix) they tend to favor their own content to maximize revenues. In the same vein, music streaming services often act as gate keepers and can favor certain songs or artists – for pure commercial reasons, and with negative consequences for music authors. Moreover, the high level of concentration in the music sector (with only three major labels) is also a matter of concern since playlists are often prioritising the three major's Anglo-American repertoires at the expense of more culturally diverse music, with a narrow "filter bubble" effect.

In the music sector, the way major music streaming services function has even often led to manipulation and fraud. Numerous examples can be found in the music press about various ways to artificially boost the number of streams to increase market share, get a better chart positioning and ultimately get more royalty payments for non-legitimate purposes. Fake accounts[5] - in breach of authors' moral rights - have often been used by music streaming services with tangible suspicions that those accounts can give a competitive advantage to the streaming service. Ultimately, streaming manipulation leads to the unacceptable devaluation of legitimate creators. The fact that streaming payments are calculated as a percentage of total plays (pro-rata model) also means that any inflated streaming counts reduce the per-stream payments for everyone.

In that regard, we encourage the EU institutions to have a critical assessment of the different possible repartition models (pro-rata or user centric) used by streaming services, as well as an review on the distribution of streaming revenues to various categories of creators and rightsholders. Today's model of repartition amongst rightsholders is largely based on the CD model - with the lion's share for the record producers. This results in an extremely low remuneration for composers and

[5] https://www.musicbusinessworldwide.com/spotify-fake-artists-return-but-whos-faking-their-plays-within-user-accounts/; https://www.musicbusinessworldwide.com/why-spotifys-fake-artists-problem-is-an-epidemic-literally/

songwriters – on which the success of a song heavily relies - at a time when streaming is one the major avenues to listen to music.

In general, platforms' practices call for a high level of transparency and accountability as well as for serious public authorities' scrutiny when it comes to data usage and the use of AI powered algorithms, in particular from dominant streaming services. Platforms, including the tools that they provide (such as playlist and content identification systems) should be subject to fair, transparent, and non-discriminatory terms.

This is not only essential to bring fairness and transparency to creators but also key to ensure that EU law, and in particular certain legislative proposals recently adopted (such as the Copyright Directive and the AVMS Directive) can be properly implemented and enforced:

- With the adoption of Article 19 (Transparency obligation) of the Copyright Directive, all platforms which engage in the exploitation of copyrighted works will be required to inform authors and performers (as well as "first licencees" – publishers and producers) about the exploitation of their works. This provision is of utmost importance for music authors to ensure that they can assess the value of their works, get a proportionate remuneration and know their audiences.

- Likewise, with the AVMS Directive, the EU has introduced clear obligations for on-demand audiovisual services to have at least a 30% share of European content in their catalogue and to ensure the prominence of this content. In order to respect this obligation, on-demand audiovisual services will have to make at least part of their data usages available to regulators.

Those examples show that important public policy objectives (such as the promotion of cultural diversity) are impossible to reach without meaningless transparency obligations. All rightholders, regardless of their size and bargaining power, should be able to easily access transparent information about the exploitation of their works.

Against that background, we believe that the EU should also encourage more diversity through measures aimed at improving the promotion, visibility, and discoverability of European musical works. AI powered algorithms should be subject to fair, transparent, and non-discriminatory rules to prevent discrimination between large and small repertoire owners. The value of pluralism as well as the respect for cultural and linguistic diversity are founding principles of the European Union. EU institutions and its Member States have a role to play to preserve them and to ensure that cultural diversity and pluralism can flourish on digital platforms.

3. Offering authors the right to engage into collective bargaining agreements

Music authors are in their vast majority free lancers and self-employed. They create works protected by copyright, and as such, usually get an initial payment for creating their works - as well as, in most cases – a share of the income generated by the exploitation of their works. They face precarious working conditions as well as poor and unstable income.

Today, they do not have the possibility to negotiate minimum rates or to set standards contracts for the services that they provide. While platforms can dictate terms, composers and songwriters have only the option between two choices: take it or leave it as the competitor is just one click away. Ultimately, this leads to a downward spiral of rates and income.

Articles 18 to 23 of the Directive on Copyright in the Digital Single Market (adopted in 2019 with an implementation deadline on 7 June 2021), set out a new harmonized framework for the contractual relationship between authors and their contractual counterparts which stems from the explicit acknowledgement by the EU legislator of the systemic weak bargaining power of authors negotiating their individual contracts.

This new set of rights is inter-connected: the transparency obligation (Article 19), cornerstone of the Chapter, is indispensable to the implementation of a right to proportionate remuneration (Article 18) based on the actual exploitation and commercial success of the work, as well as to allow for the effective use of the contract adjustment mechanism (Article 20) the revocation right (Article 22) and the dispute resolution procedure (Article 21). The Directive very much encourages collective bargaining agreements (mentioned 7 times in the Directive) to reach the level of protection and enforce the rights provided by the Directive.

However, many national competition authorities have considered that freelance authors are “undertakings” under competition law, and as such, cannot engage in those agreements, which amount to “price fixing”. This has been the case in Spain, where two associations of screenwriters were fined for publishing information about rates of pay on their respective websites. In the Netherlands, the competition authorities prohibited the publication of rates of pay for writers of literature. In Ireland the Competition Authority cancelled an agreement in 2006 between advertisers and voice over actors, which led to a cancellation of pre-existing agreements in other arts sectors and an end to collective bargaining in the sector. Some Member States have tried to address this situation and allow collective bargaining agreements for authors but this still results in a patchy, unclear, and unharmonized framework. The lack of legal certainty ultimately prevents authors’ organizations to start discussions with their counterparts – which can take years to finalize.

We strongly believe that the goodwill of contractual counterparts to negotiate contractual terms and remuneration on a collective level should be encouraged and not impeded, by the EU. Setting up a legal framework where contractual counterparts can and have to negotiate model contracts, minimum tariffs, etc. is the best way to establish fair industry practices.

We therefore urge the European Commission to find a solution whereby the application and interpretation of EU competition would no longer prevent authors to engage into meaningful and efficient collective bargaining agreements with their counterparts.