



SERVING AUTHORS WORLDWIDE  
AU SERVICE DES AUTEURS DANS LE MONDE  
AL SERVICIO DE LOS AUTORES EN EL MUNDO

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## **CISAC Position Paper on the EU “Copyright Package”**

## Executive Summary

CISAC acknowledges that the “Copyright Package”<sup>1</sup> is an opportunity to create a copyright framework which better reflects the online market. The objectives fostered by the European Commission (EC) to allow better choice and access to content online and across borders, to improve and adapt copyright rules to the digital and cross-border environments as well as to achieve a well-functioning and fair marketplace for creators are important goals shared by CISAC members.

CISAC welcomes the first step taken by the EC to address the failings in the online market (referred to as “transfer of value” or “value gap”), which acts against the best interests of creators and the economy as a whole. It also greets the recognition, through the introduction of the extended collective licensing or mandatory collective management mechanism, that collective management is an efficient and successful solution for wider access to creative content and that CMOs are competent in adapting their processes to online uses of works.

CISAC appreciates as well the obligations in relation to greater transparency (referred to as the “transparency triangle”) in relation with author’s contracts, with those to whom they have licensed or transferred their rights, since these kind of provisions can certainly contribute to the correct functioning of the market.

These proposals are a step in the right direction, but they need to be further strengthened by certain amendments during the legislative adoption procedure to secure fair remuneration and a better future for creators while providing an appropriate legal framework for all stakeholders. It is of utmost importance for CISAC since its members around the world are entrusted with the management of creators’ rights which are used in Europe: these members are thus directly concerned by the outcome of the EU reform.

It is therefore CISAC’s position that the following improvements should be introduced in the Copyright Package proposals:

- Greater clarity on the application of the communication to the public right and the status of platforms which host user uploaded content in order to avoid any circumvention or costly legal proceedings that can be tried by the concerned services despite the clear intention of the law;
- Clarification of the concept of “public” and other dubious newly elaborated elements of the legal notion of the communication to the public right, in order to avoid any further conflict of interpretation by courts;
- Clarification of the liability scheme for acts of communication to the public in which different actors play roles in the process of communication to re-establish an adequate protection of copyright;
- An unwaivable and inalienable right to remuneration for audiovisual creators to ensure that authors are fairly remunerated for the online exploitation of their work.

It is also underlined that:

- The territoriality principle, which have a well-founded legal and economic justification, should remain at the core of the EU Copyright legislative framework;
- The clarifications proposed in Article 12 and Recital 36 of the Proposed Directive are essential to provide the needed legal certainty to ensure that compensation for uses of works under an exception or limitation can be appropriately shared amongst the relevant parties;
- The careful approach on exceptions and limitations to authors’ right should be maintained. It should be ensured that they are appropriately accompanied by a compensation scheme.

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<sup>1</sup> Proposal of a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market. COM (2016) 593 final 2016/0280 (COD) and Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions. COM/2016/594 final – 2016/0284 (COD).

## CISAC

CISAC, the International Confederation of Societies of Authors and Composers, is the umbrella organisation representing authors' societies (also referred to as Collective Management Organisations, CMOs) for authors worldwide. Founded in 1926, CISAC is a non-governmental, not for profit organisation based in Paris, France, with regional offices in Hungary, Chile, Burkina Faso and China. CISAC counts 239 authors' societies as its members. These societies are based in 123 countries, including EU Member States. Together, CISAC societies around the world represent more than 4 million creators from all artistic disciplines including music, film, literature, drama and visual arts.

CISAC's key mission is to promote the interests of these creators and safeguard the future of creative activity and cultural diversity in Europe and around the world. CISAC is constantly working to enrich the modern copyright debate and to secure a position for creators at international, regional and national levels.

### **1. Clarifications on the communication to the public right and the status of user uploaded content (UUC) services**

The creators' community agrees that the proposal made by the EC is a positive step towards tackling the transfer of value issue as it correctly recognises that (i) the Internet is now a primary marketplace for the distribution and access to copyright-protected content and (ii) rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works - this is particularly the case in respect of UUC platforms. Online access to cultural content has seen a huge transformation in the last 10 years with the emergence of many new business models and services for the delivery of digital content. Some of these services, including UUC platforms, which actively promote and provide access to cultural content, are wrongly claiming they are not liable, or at least not fully liable, for giving access to those works. Instead they claim to be mere hosts, despite their very active role, and as such are eligible to claim the hosting defence in Article 14 of the E-Commerce Directive.

The economic weight of these UUC services is significant. Some of them are owned and operated by the world's largest corporations. Yet according to CISAC's 2016 Global Collections Report, royalty collections by CISAC societies for the use of creative content online represented only 7.2% of overall collections. This low level of royalties is testament to the difficulties that authors' societies have in licensing and enforcing the rights of creators. UUC platforms routinely leverage the current legal framework to avoid obtaining licenses or extract below market rates for exploiting creative content. This has resulted in a plummeting share of revenues for authors while the online use of copyright content soars and online intermediaries generate huge revenues. This transfer of value from creators to UUC services is the most challenging issue in today's digital environment. It needs to be urgently and thoroughly addressed in Europe and beyond as it impacts creators across the world.

Thus the proposals of the European Commission are a very welcome step in the right direction. However, in order to provide the necessary legal clarity and ensure their effective application, the concerned provisions (Recitals 37 to 39 and Article 13 of the Proposed Directive) need to be further strengthened.

Recital 38 must be unequivocal that information service providers, hosting user uploaded content, are undertaking an act of communication to the public and where they are also playing an active role are required to obtain a licence from the relevant rightholders. There must be no ambiguity in these principles. Also, and even if it is obvious, the proposal should clearly refer to the reproduction right as soon as it is also involved in operations of storing and providing access to content.

These essential clarifications and amendments will ensure that rightholders' rights to authorise the uses of their works are preserved and ensure the fair distribution of remuneration to creators. In addition, it will address the imbalance in the online market where licensed providers are forced to compete with UUC services who can pay little or nothing for the use of the works they exploit.

It is important to note that these proposals have been highly welcomed by the global community of rightholders. It has been particularly supported in Canada, Australia as well as in the United States where a coalition of over 20 American organisations representing songwriters, independent and major labels, music publishers and CMOs have taken the unprecedented step to write a letter to US policy makers asking the US government to support Article 13 of the Copyright Directive explaining that this article will place all services "on a level playing field that protects creators and the digital marketplace itself".

If adopted, the EU will be the pioneer in the implementation of supportive and effective legal frameworks that establish a fair market for creators. It will also be a good sign to countries outside the EU who may decide to view these rules as a precedent and implement similar rules. This is of utmost importance for the creative community as the current situation has created an inefficient, untenable and unfair market, and threatens the long-term health of international cultural and creative sectors.

## 2. Clarification on the concept of "public" in the communication to the public right

The proposed Directive provides the necessary clarification as regards the application of the communication to the public right to UUC platforms. As underlined above, these clarifications are highly desirable. However, they could be further improved if the interpretation of what constitutes a "public" is clearly stated since the notion of "public" is the key concept on which this right applies.

Indeed, within the EU, recent CJEU rulings on the right of communication to the public have significantly reshaped its scope and content, compared to the international standard defined in Article 8 of the WIPO Copyright Treaty (WCT) as well as in regional instruments such as the EU InfoSoc Directive and in domestic laws.

The conflicting interpretation of what constitutes a "public" in the different case law could have dramatic implications for the remuneration of rightholders.

Successive judgments have erroneously interpreted the right of communication to the public, in particular with regards to the definition of "public". The CJEU based the interpretation of the concept of "public" on the definition of the old Glossary of WIPO, which does not reflect WIPO's current position. WIPO's position has to be considered in light of the new Glossary of 2003, which defines the "public" as *"a group consisting of a substantial number of persons outside the normal circle of a family and its closest social acquaintances"*. The definition continues to specify that *"It is not decisive whether the group is actually gathered in one place; the availability of works or objects of related rights for the group suffices"*. This part of the definition is of utmost importance when it comes to digital transmission.

Thus, the draft Copyright Directive provides a good opportunity for the EU to clarify the definition of the concept of "public" by referring to the WIPO definition as stated in the WIPO glossary of 2003 and to guarantee that any interpretation of such concept will be in line with Articles 8 of the WCT and 3 of the INFOSOC Directive.

Besides complying with the international understanding, this would significantly help rightholders to defend their right, in the digital environment.

This clarification could contribute to eliminate the harmful and, at times contradictory, interpretations of the communication to the public right, such as “the fairly large number of people”, the “exhaustion” of the right and the profit making nature of the act of use which cannot be found in the decisive international instruments, nor in the EU legislation.

### **3. Clarification of the joint liability regime applicable to acts of communication to the public involving more than one party in direct injection broadcasting**

In many recent cases involving broadcasting transmissions, broadcasters that send their signals directly to cable, satellite, IPTV or other operators refuse to acknowledge their liability with regards to copyright to avoid licensing, stating that there is only one act of communication to the public made by such operators. At the same time, these operators portray themselves as “mere technical facilitators of signals” and refuse to be responsible for the communication of broadcast programs to the public.

This situation refers to the “direct injection”, which is a two-step process where a broadcaster transmits programme-carrying signals to a distributor (cable or satellite operators, or others) through a point to point private path, and the latter picks up the signal to distribute it to end-users, who are then able to view the programme on their televisions. Broadcasters and distributors use the uncertainty regarding who makes the communication to the public to avoid licensing and payment of the remuneration.

The successful CJEU decision in the *Airfield* case<sup>2</sup> offers a guidance for direct injection by stating that there is one single act of communication to the public and ruling that both the satellite operator, which intervenes in the direct transmission of television programmes, and the broadcaster are liable for the act of communication to the public and thus need an authorization, which can be granted to one of them for both or to the two of them.

It is of utmost importance for such a growing market that the liability of the various entities contributing to a single communication process is clarified in the proposed Broadcasting Regulation. It should be recognised that there is a single act of communication to the public for which the broadcaster and the distributor need to clear the relevant rights directly with the concerned rightholders for their respective participation in the act of communication to the public they perform jointly.

### **4. Introduction of an unwaivable and inalienable right to remuneration for the making available right of audiovisual works**

When lawmakers established a right for audiovisual authors in 1948<sup>3</sup>, their aim was to create a legal framework that fostered the development and diversity of creation. However, over the years, audiovisual authors have seen the essential link between the exploitation of their work and their remuneration become eroded. While operators, broadcasters and distributors generate significant profits from TV programs and film usage, creators at the very heart of the creative process rarely receive any payment due to the common business practice of producers taking all rights from creators, which makes it impossible to receive any percentage royalties from the success of the work. This has become even more difficult in the digital environment.

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<sup>2</sup> CJEU, 13 October 2011, Cases C-431/09

<sup>3</sup> Audiovisual works were added to international copyright conventions as independent artistic works only in 1948 (Article 14bis of the Berne Convention for the Protection of Literary and Artistic Works)

Thus, it is of utmost importance that EU introduces into the Copyright Directive a new provision establishing an unwaivable right of remuneration for directors and screenwriters so that they can make a livelihood with their creation, in particular in the digital world where there are no national borders. It will restore equality and ensure a fair remuneration for all audiovisual authors throughout Europe.

This right of remuneration should be proportional to the amount of revenue generated, for each use of the work, and should not be waived or transferred to a third party. It should be paid by the end users (digital platforms) through collective management societies mandated by authors to collect and distribute it in order to ensure that it will be enforced collectively without leaving authors behind due to an incapacity to enforce their right individually.

In several European countries such rights to remuneration are already effective for specific exploitations, through a voluntary collective management system of their exclusive rights (France, Belgium) or through a right of remuneration system subject to mandatory collective management (Spain, Italy, Poland) . There is also a growing movement in Latin American countries. Thanks to CISAC's efforts in Chile for example, the Ricardo Larrain Law (n°20.959) has just been adopted by the Parliament in October 2016. It recognises an unwaivable and inalienable right of remuneration for directors and screenwriters as well as allows audiovisual creators, for the first time ever, to obtain royalties for broadcasting, making available, public lease and screening in movie theaters of their works. A similar legislation is in the process of being adopted into law in Colombia with the "Pepe Sanchez" Act.

## **5. Maintain the territoriality principle at the core of the EU copyright legislative framework**

The proposed Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television (TV) and radio programmes aims at extending the facilitation of the clearance of rights mechanisms introduced by the Satellite and Cable Directive 93/83/EEC of 27 September 1993 (SatCab Directive) to certain online broadcasting services. In particular, the proposal extends the principle of the country of origin according to which the copyright relevant act takes place solely in the Member State where the broadcasting organisation is established, to the provision of online services that are ancillary to the original broadcast of the broadcasting organisations.

Although CISAC, together with European groupings, have supported the territoriality principle during the consultation process and have opposed the extension of the country of origin principle, as a general rule, the final proposal seems acceptable since the scope of the targeted services is finally limited in a way that it will not change the current licensing practices. However, CISAC considers that the scope of services should not be extended for several reasons.

First, the country of origin principle is a derogatory rule to the general principle of territoriality which preserves cultural diversity and is at the core of the functioning of the creative industry, in particular the audiovisual sector. Territoriality of copyright is not an impediment to cross border licensing. There is no justified reason to restrict the ability of a rightholder to control the exploitation of its works by limiting it geographically.

Moreover, the application of the country of origin principle to multiterritorial online services could encourage a "race to the bottom" among content providers to establish themselves in the territory where the copyright scheme is more lenient and where they will benefit from the most favourable conditions to exploit work. It could be very detrimental both to European and non-European rightholders as it would jeopardize the value of their rights and have a negative economic impact on their remuneration.

## **6. Maintain the careful approach on exceptions and limitation to author's rights**

In light of digital technologies permitting new types of uses in the fields of research, education and preservation of cultural heritage, the draft Directive introduces new mandatory exceptions and limitations for uses of text and data mining technologies in the fields of scientific research, illustration for teaching to online cross border usages, and for preservation of cultural heritage. CISAC welcomes the careful approach taken by the EC in this regards, in particular in respect to the exception for illustration for teaching where Member States have the availability to limit its application when there is already a well-functioning existing licensing scheme and to provide fair compensation for the harm incurred due to use of the works. It is of utmost importance since it provides significant revenues for creators and particularly for visual authors. Three step test should be applied to all suggested exceptions and limitations to make sure that no existing and established licensing practises and revenue streams are compromised.

CISAC also appreciates the position taken by the EC to finally consider that the panorama exception does not require neither further intervention nor harmonization at the EU level.

The creators' community will remain cautious during the debates before the EP to avoid any further exceptions and limitations or the widening of existing ones. CISAC underlines that ensuring wider access to protected content could be achieved by other means than the creation of exceptions to authors exclusive right.



Regarding the concerns that relate to particular categories of repertoires, CISAC invites to the consultation of the detailed positions provided by the European groupings: GESAC (primarily music repertoire), SAA (audiovisual repertoire) and EVA (visual arts repertoire).