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Comments presented by the International Confederation of Societies of Authors and Composers (CISAC)

To the

Council of Europe Draft Recommendation of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries

Introduction

Founded in 1926, CISAC is a non-for-profit, non-governmental organization based in Paris, France with regional offices in Hungary, Chile, China and Burkina Faso. CISAC counts more than 239 authors' societies in 121 countries on the five continents. Through its member societies, it represents more than 4 million creators from all geographic areas and all artistic repertoires, including music, audiovisual, drama, literature, and visual arts.

CISAC represents the voice of creators and seeks to protect their rights, advocating for the interests of creators across the globe. It aims to secure fair remuneration for authors for the use of their works for all kinds of exploitations anywhere in the world.

CISAC works to assure that the voice of creators is at the heart of international legislative decision-making fora with the goal to foster a legislative environment that supports cultural and creative industries. Thus, contributing to both cultural diversity and economic growth worldwide.

Author´s rights are a human right recognised by the Universal Declaration of Human Rights ("UDHR") (Art. 27.2) and as a form of property by the Charter of Human Rights of the European Union ("CHREU") (Art. 17.2). They are also protected as a subcategory of "possessions" by the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe ("The Convention"), under Article 1 of Protocol 1, as it has been recalled by the Parliamentary Assembly of the Council of Europe on Resolution 2110, adopted on 20 April 2016 ("The Resolution").

"The Resolution" rightly warns about the "*de facto* erosion of intellectual property rights in the digital era", recognising that "intellectual property is an important cultural value and economic asset in Europe and an erosion of intellectual property rights would have a significant negative impact on Europeans". It also recommends that member states (Paragraph 8.1) "promote public awareness, especially among Internet users, of the human right to the protection of intellectual property and the importance of this right for the cultural diversity and the economic well-being of our societies".

As the Parliamentary Assembly of the Council of Europe has rightly pointed out on "The Resolution", one of the major challenges of the digital environment today is the protection of author´s rights. Governments, creators´ organizations and civil society need to work together for the implementation of legislative, political, and technical measures that boost creativity as an engine for social and economic wealth while guaranteeing a positive balance of the different rights at stake: freedom of speech, freedom of creativity; freedom to conduct business and protection of privacy and personal data.

CISAC welcomes the *Invitation to Comment* made by the Steering Committee on Media and Information Society (CDMSI) of the Council of Europe of the *Recommendation of the Committee of Ministers to member states on the roles and responsibilities of internet intermediaries* ("The Recommendation"). It considers as well that, while "The Recommendation" correctly points out that it is essential to safeguard the fundamental rights of users and other actors of the internet landscape, it tends to neglect the fundamental rights of creators.

For these reasons, CISAC would like to contribute to this important debate by presenting the following comments and proposals of amendments to "The Recommendation".

1 The need to address the problem of Transfer of Value

In words of CISAC President and music composer Jean-Michel Jarre, "*Today, the foundations of our creative world are being re-written by the digital revolution. Never have creators had access to so many ways to create and disseminate their works. Never have our works found such a large audience. This is an amazing opportunity, and creators are embracing change. The digital world has empowered them and has put them at the heart of the creative economy. At the same time, the digital world has created new pressing needs for creators worldwide. Globalisation has seen an increasing concentration of tech giants with immense power to get creative content on the cheap. Today, some of the world´s major digital music services are building large businesses on the back of creativity while paying next to nothing in return. This is not fair. It is a market distortion. And it is holding back growth in the creative sector*"[1].

This problem is known as **"Transfer of Value".** It consists on an unfair misallocation of revenue to those who make available, promote and monetise content at the expense of those who create and invest in content. Local creators and, in turn, cultural diversity are especially at risk. For example, the UK music industry revealed in April 2017 that artists earned more from vinyl sales in 2016 than from YouTube payments for music[2].

Today´s digital cultural content consumption has to be built on a sustainable basis in order to guarantee the cultural heritage of tomorrow.

This is one of the main concerns raised by **UNESCO**´s member states, as reflected in the new *Operational Guidelines on the implementation of the Convention of the Protection and Promotion of the Diversity of Cultural Expressions* that were approved on June 15th, 2017 ("The Guidelines") by the Conference of the 145 Parties having ratified the Convention.

The Guidelines in their General Considerations include the need to:

- 8.9.: *Promote respect for fundamental freedoms of expression, information and communication and for privacy and other human rights as pre-requisites for the creation, distribution and access to diverse cultural expressions. This includes promoting artistic freedom as a corollary to freedom of expression, the social and economic rights of authors and artistic working in the digital environment and connectivity of all partners to partners with those of their choice*
- 14.2.: *Contribute to creation and to the fair remuneration of authors and performers*
- 14.6.: *Recognize and value the work of creators in the digital environment, by promoting:*
  - *Equitable and fair remuneration for artists and cultural professionals;*
  - *Transparency in the distribution of income between digital distributors, Internet Service Providers (ISP) and rights holders as well as among rights holders. (…)*
  - *Respect for and protection of intellectual property rights, allowing for collective management, if applicable, and for collective bargaining of digital rights*

[1] See CISAC´s annual report 2017. http://www.cisac.org/Newsroom/News-Releases/CISAC-Releases-2017-Annual-Report-From-China-to-Chile-CISAC-is-turning-up-the-volume

[2] See: https://www.theguardian.com/business/2017/apr/15/music-industry-youtube-video-streaming-royalties

The **European Parliament** has also pointed to the problem of Transfer of Value in its *Resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*:[3]

- *Whereas creative works are one of the main sources nourishing the digital economy and information technology players such as search engines, social media and platforms for user-generated content, but virtually all the value generated by creative works is transferred to those digital intermediaries, which refuse to pay authors or negotiate extremely low levels of remuneration.*

The Transfer of Value is sustained because of a market distortion that allows online intermediaries to avoid the normal rules of copyright and music licensing that should apply to these intermediaries. Even if they clearly make creative content available to others, and should be responsible for obtaining individual or collective licencing solutions from relevant rights holders, they avoid doing so by abusing existing safe-harbour legislations, taking advantage of loopholes and misinterpreting existing laws.

Safe harbour legislation (i.e., the 1998 *Digital Millennium Copyright Act* in the USA on copyright safe harbour or the *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* ("Directive on electronic commerce") bringing about a horizontal ruling and safe harbour vis a vis all exclusive rights (e.g. personality rights, copyright and industrial property rights)) were intended to exempt online intermediaries from liability where they were **merely passive and technical** in nature and where they had **no knowledge** of the content they handled. When those legislations were adopted, the main services that operated at that time were purely technical and passive storage services. The service they provided did not imply any kind of knowledge or intervention over the content by the ISP, performing a purely passive role.

But the Internet landscape has changed considerably since 2000. Today a new generation of ISPs that did not exist at the time these safe harbour legislation were enacted - such as user-uploaded content services (UUC)- have become major players in the online market and do much more than just providing a physical facility. Some of them deliberately provide Internet users with access to protected content, therefore, **playing an active role** in the dissemination of such content as part of their business model. In such cases, they carry out an act of communication to the public protected by author´s rights legislation[4] together with the users of their services.

In September 2016, the European Commission took a positive first step in order to address the Transfer of Value problem in a balanced manner that can guarantee fair treatment of freedom of speech, the right of privacy and author´s rights while respecting the main principles of the safe-harbour legislations[5] at the same time. The Proposal of Directive on copyright in the single market, once approved, will be able to avoid abuses of misinterpreting existing safe harbour legislations.

[3] See also European Parliament Resolution of 13 December 2016 on a coherent EU Policy for cultural and creative industries (2016/2072 (INI)). http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0486&language=EN

[4] See CISAC Position Paper on the transfer of value. http://www.cisac.org/What-We-Do/Legal-Policy/CISAC-position-paper-on-the-transfer-of-value

[5] Proposal of a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market. https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market

In particular, CISAC considers that EC proposals contained in Recitals 37 to 39 and in Article 13 of the draft Directive should be taken into account by the Council of Europe (together with The Resolution; the 2015 and 2016 European Parliament Resolutions and UNESCO´s guidelines, all of them mentioned above) in order to achieve a more balanced text for the Recommendation that will take into account the concerns and views of all actors in the Internet landscape, including creators and other rights holders.

Recital 38 of the draft directive sets out a meaningful clarification. It confirms that UUC platform acts amount to communication or making available to the public, and that they are jointly liable with the uploader if they play an active role, including by optimising the presentation of uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefore.

The provisions are meant to solve the current market conditions, which allow these platforms to deny negotiating, or paying far less than a fair remuneration for the distribution and use of the creators' copyright-protected content.

The ambiguities of the current legal system allow these platforms to successfully but wrongly claim that their acts do not amount to communication to the public or making available to the public under the Information Society Directive, or that their role is purely technical and passive, therefore they are subject to the E-Commerce Directive safe harbour status provisions.

Based on the above, CISAC believes that the current text of the Recommendation could be considerably improved by introducing the following amendments.

2 Include a reference in the Preamble of the Recommendations to the need of protecting author´s moral and economic interests on the Internet.

In its current version, the draft does not include any reference to intellectual property rights and their erosion in the digital environment. CISAC believes this has to be corrected in order to provide a more complete and balanced view of the challenges that the digital era imply for the protection of fundamental rights. CISAC proposes therefore to introduce in the Preamble of the Recommendations the following amendments:

- ***Preamble***
  1) *(…)*
  2) *(…). It also enables significantly the exercise of other rights protected by the Convention, such as the right to freedom of assembly and association, the right to education, access to knowledge and culture, <u>the right to the protection of the moral and material interests resulting from any scientific, literary or artistic creation,</u> as well as participation in public and political debate and in democratic governance. However, the Internet has also facilitated an increase of privacy-related offences, <u>violations of intellectual property rights,</u> and of the spread of certain forms of hate and incitement to violence, in particular on the basis of gender and race, which remain under-reported and rarely prosecuted.*
  3) *(…)*
  4) *(…)*
  5) *(…)*

6) *(…) Owing to the multi-functionality of intermediaries, which may be merely transmitting third-party content or performing more curatorial or editorial-like functions, special efforts are required to determine what function is being performed with respect to certain content in order to assign the corresponding duties and responsibilities. In particular, concerning author´s rights, user-uploaded content services (UUC) that communicate works to the public should not be able to benefit from the liability limitations of the safe harbour provisions when in fact they play an "active" role by, e.g. promoting, organizing, indexing protected works and/or other subject matters to the public, including by means of automated tools.*
7) *(…)*
8) *(…)*
9) *(…)*

- In implementing the guidelines, take account of Committee of Ministers Recommendation 2016/5 on internet freedom; Recommendation 2016/3 of human rights and business; Resolution 2110 of the Parliamentary Assembly of the Council of Europe on Intellectual Property Rights in the digital era (…).

- Engage in a regular dialogue with stakeholders from the private sector, civil society, academia, the creative and the technical communities (…).

- Encourage and promote the implementation of effective age and gender-sensitive media and information literacy programmes to enable adults, young people and children to enjoy the benefits and reduce the exposure to risks of the online communications environment, in cooperation with stakeholders from the private sector, civil society, education, academia and the creative and the technical communities.

3 Include a reference to the need to also safeguard intellectual property rights, as well as the need for cooperation between Internet intermediaries and rights holders in Chapter 1.3.

The draft recommendation's point 1.3.3. says that "state authorities should not directly or indirectly impose a general obligation on intermediaries to monitor content to which they give access". However, it is essential that a well-defined and specific monitoring obligation is put in place to enable cooperation with rights holders.

Collaboration between rights holders and service platforms is indispensable for the effective, proportionate and targeted monitoring of the uses of copyright protected content online. In particular, the produced data detailing the use of the works on the platform is essential for the accurate distribution of remuneration to authors and rights holders.

Article 13 of the EU Commission's proposal for a Directive creates an obligation for UUC platforms, regardless of safe harbour provisions, **to cooperate on the deployment of technical measures if they store and provide access to large amounts of content**. Under Article 13, such services are required to deploy effective technical tools to identify works and other subject matter in order either **to support the functioning of the agreements** with rights holders or **to prevent access to works and other subject matters identified as infringing by rights holders** on their platforms. Today, in most cases, such recognition tools are either not in place or are provided by the platforms at their own discretion and have been decided without taking into account the needs of creators and rights holders in terms of efficient rights management. This provision is therefore a welcome step towards addressing the serious economic and political problems caused by certain platform services that have become the main access route for cultural and creative content online, but which deny any liability for such content through hiding behind safe harbour provisions.

As mentioned above, privacy, freedom of expression and information, as well as intellectual property are fundamental rights as listed in both the EU Charter of Fundamental Rights of the European Union (CFREU) and the European Convention of Human Rights (ECHR). Data protection and freedom to conduct business are also among the fundamental rights listed in the EU Charter. Inevitably, those rights can conflict with one another but both texts are clear: rights can be limited to the extent that the limitations are "*necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*" (CFREU) or are "*prescribed by law and are necessary in a democratic society, (…) for the protection of the reputation or rights of others"* (ECHR).

What matters and is widely recognised is striking a fair balance between rights. For example, in two cases where the European Court of Human Rights considered the need to reconcile two fundamental rights, the Court acknowledged the precedence of justified copyright sanctions over the right of free speech (Ashby Donald and Others vs. France (36769/08)) and Neij and Sunde Kolmisoppi v. Sweden - 40397/12 (the Pirate Bay Case). In this regard, as some academics have already pointe out[6] article 13 of the draft directive is entirely consistent with the provisions of the CFREU and the ECHR.

CISAC believes that the provisions proposed by the EU Commission on its draft directive are based on a nuanced consideration of the competing interests of rights holders, Internet users and service providers among whom a fair balance must be struck.

For these reasons, CISAC proposes the following amendments Chapter 1.3. of the draft Recommendation:

- **1.3. Safeguards for freedom of expression <u>and intellectual property rights.</u>**

  1.3.3. *State authorities should not directly or indirectly impose a general obligation on intermediaries to monitor content to which they give access, or which they transmit or store, be it by automated means or not. Before addressing any request to internet intermediaries or promoting, alone or with other states or international organisations, co-regulatory approaches by internet intermediaries, state authorities should consider whether their action may lead to general content monitor. They should further consider that such monitoring is usually performed through automated means that are unable to assess context properly. The imposition of sanctions for non-compliance may prompt over-regulation and speedy take-down of all dubious content, which may result in an overall chilling effect for the freedom of expression online. <u>State authorities shall seek to promote cooperation between rights holders and those platforms that store and provide access to large amounts of content for the deployment of effective technical tools that will allow to identify protected works, in order either to support the functioning of the agreements signed with right-holders or to prevent access to works and other subject matter identified as infringing by rights holders on their platforms.</u>*

  1.3.4. (…) *Notice-and-take-down procedures should be designed in a manner that incentivises the take-down of legal content. <u>They should also be designed in a manner that incentivise the "stay-down" of illegal content</u> (…).*

[6] See, Agnès Lucas-Schloetter, "Transfer of Value Provisions of the Draft Copyright Directive (recital 38, 39, article 13). An appraisal". http://www.authorsocieties.eu/mediaroom/276/33/Transfer-of-value-Dr-Lucas-Schloetter-analyses-Commission-39-s-proposal

4 To ensure the need for rights holders to act expeditiously against unauthorised communication of protected content by introducing some amendments in Chapters 2.1.; 2.3. and 2.5. of the Draft Recommendation.

The ability to act expeditiously against unauthorised communication of protected content has a key role to play in ensuring the effective functioning of the applicable rules aimed to safeguard the legitimate interests of rights holders.

Since illegal and popular content spreads rapidly across different platforms, it is essential to provide the opportunity for rights holders to take prompt and decisive action.

CISAC believes it shall be specified that the required judicial procedure mentioned in article 2.1.3. of the recommendation should not be complicated, burdensome or involve inappropriate time limits or unwarranted delays. CISAC proposes the following amendments to Paragraph 2.1.3. of the draft Recommendation:

> 2.1.3. *All interference by intermediaries with the free and open flow of data and communications should be based on clear policies and must be limited to specific legitimate purposes, such as to preserve the integrity, universality and security of the network, or to prevent access to or dissemination of content that has been determined as unlawful by a judicial authority or other fully independent and impartial ~~state~~ government entity.* State authorities shall promote simple and bearable judicial procedures that will not involve inappropriate time limits or unwarranted delays.

The Member States of the Council of Europe should also be encouraged to implement alternative procedures to avoid the need for Court action. For instance, notice and takedown (NTD) procedures have already been implemented in a number of EU Member States, but have proven to be costly, inefficient and onerous to the rights holder. An enforcing rights holder must find as many copies of the work as possible and take action in relation to each one of these in order to have any positive impact. Even then, any positive impact is temporary. Even if files have been removed, they quickly re-appear because they are re-uploaded by the same Internet user or by a different user of the same online service, or alternatively by a user of an entirely different online service or platform. Rights holders therefore have no guarantee that illegal access to works will be effectively prevented, nor that they will receive any remuneration for the use of their works. They certainly have to go through the expensive and time-consuming notification process again. To illustrate this reality, the UK collective rights management society PRS for Music sent a total of 849 notices over a 4-month period in 2013 to one particular service, Rapidgator.net, in relation to one single musical work.

CISAC proposes therefore the following amendments:

> 2.3.4. *(…) Notice and stay down procedures implemented in collaboration between intermediaries and rights holders that take into account the evolution of technology should be encouraged by State authorities.*

> 2.5.2. *(…) Member states shall encourage the implementation of notice and "stay-down" procedures, rather than a mere notice and "take-down" in order to effectively protect other human rights, like right of privacy or author´s rights. Intermediaries should be required to remove not only an example URL but all instances of the specific infringement or illegal content, once they are notified.*

> 2.5.6. *Intermediaries should engage in dialogue with consumer associations, human rights advocates, rights holders´ organizations and other organizations representing the interests of users to ensure (…).*

Conclusion

Borrowing from the words of the Parliamentary Assembly on The Resolution, “thanks to the Internet, authors of creative works and holders of intellectual property rights are able to offer their works globally and users can access creative works instantly”. This is a very positive aspect of the Internet revolution. However, in order to produce works and to boost the wheel of creativity, creators and the cultural industries they generate need to work in a sustainable environment that can guarantee a fair return for their efforts.

The legal system of the responsibility of Internet intermediaries is at the heart of the extraordinary and, in most aspects, positive development of the Internet over the past two decades. However, the legislations that were suitable for the emerging Internet in 1998 are no longer suitable for the powerful and sophisticated Internet economy of 2017.

The rules that will govern the Internet of the future need to be built with a broad and inclusive perspective, taking into account all interested parties and providing for an effective balance of all the fundamental rights at stake.

For this reason, CISAC asks the Council of Europe to take into consideration its comments and proposals of amendments in order to assure that the creative community will also be heard.