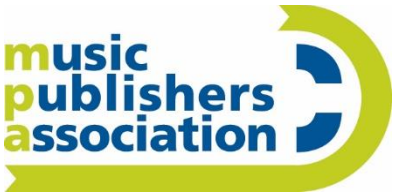





# Call for views: Modernising the European copyright framework

6 December 2016

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**MPA Group submission**

**Call for views: Modernising the European copyright framework**

The MPA is a founding member of UK Music; we broadly agree with the response put forward by UK Music on behalf of the entire music industry. Specifically, we worked with UK Music's constituency of composers, music publishers, performers, music managers, producers, record companies and both collecting societies in preparing UK Music's detailed comments on:

- Exception for the sole purpose of illustration in educational establishments
- Out-of-commerce works
- Access and Availability of AV works on VOD platforms
- Claims for Fair Compensation
- Certain uses of protected content by online services

We make supplemental comments to UK Music's position paper regarding (I) Articles 14 – 16 of the proposed Directive on Copyright in the Digital Single Market; and (II) the proposed Regulation regarding online broadcasting and retransmission.

## I. Proposed Directive for Copyright in the Digital Single Market

As regards Articles 14 to 16 we put forward the following considerations on behalf of the music publishing sector.

### Article 14 Transparency obligation

Transparency is fundamental to the music industry, in particular as regards the need for data about music uses which need to be accurately reported by commercial users so that music publishers are able to share revenue and information about uses with composers.

For many years UK music publishers have delivered data and information to composers to an extent and in a format which they need in order to properly manage their repertoire and income. Transparency is a key factor in attracting composers to a particular publisher in the competitive market for their services. As such contracts between publishers and composers will include, as a matter of course, obligations to provide detailed information about the exploitation of their musical works as well as audit rights.

A considerable part of the income for composers is derived from uses administered by collective management organisations, and transparency constitutes one of the main elements of the recently implemented Collective Rights Management Directive (c.f. Recital 41 of the proposed Directive on Copyright in the Digital Single Market).

**Article 15 Contract adjustment mechanism**

1. Whilst there will always be debate about the commercial value of a contract, we do challenge the underlying assumption of an inherent unfairness in contracts between composers and music publishers. The evidence provided in support of the proposed legislation (and in particular the study on authors' remuneration) is entirely lacking in substance and, given that very few composers responded, the sample is far too small to be representative of the industry as a whole. In such a competitive market for the services of composers it is paramount for music publishers to remunerate the composers fairly not least to ensure that their relationship continues. At the end of a contractual term (typically 3 -5 years) composers will decide whether or not to stay with that publisher, which will often turn on whether they believe their existing contractual arrangements are equitable. As such, the fairness of remuneration is a constant factor in the commercial relationship between composer and music publisher.

Another important factor in the commercial relationship between composers and music publishers is that the publisher assumes all of the risk when acquiring a work or signing a composer. A publisher cannot know in advance whether a composition will be a success (and therefore provide a return on investment) or a failure. Inevitably, successful composers cross subsidise the less successful composers signed up to the same publisher because the publishers foster new talent by making recoupable but not returnable advances to composers. Only the successful composers recoup and therefore only the ability to cross subsidise enables the publisher to invest in new and diverse talent. If the successful composer has a statutory right of renegotiation the business model changes and if the cross subsidisation disappears as a result of a renegotiation it will be the developing talents who suffer through lack of investment; Statutory interference will not of itself generate an increase in the total pot of revenue available for the music industry; it will only lead to a change in how it is distributed at the expense of new and diverse talent.

2. The Article as currently drafted is extremely wide, and we are concerned that it cannot adequately address the interests of authors and performers across the range of different contractual relationships between composers and publishers.

More specifically, there is a huge variety of music publishing contracts such as single song agreements, exclusive publishing agreements or administration deals, each with very different contractual terms. For example, administration deals typically provide for a payment to the publisher in return for administering a composer's repertoire. In such a relationship contract adjustment mechanisms are entirely inappropriate. In an exclusive songwriter agreement (the most common form of contractual relationship) composers receive a high percentage of the income received from the use of the musical compositions that are the subject of the contract; consequently, the composer benefits directly and proportionately through his share. The split of royalties depends on many additional considerations, such as the extent of rights granted, the magnitude of the initial investment by the publisher and the reputation of the composer, which need to be considered in the individual commercial negotiation; they cannot be generalised but are always at least 50% and generally at, or north of 75% in favour of the composer.

Over the years, the commercial terms of music publishing contracts have changed considerably in favour of the composer.

Further, composers enjoy considerable legal protections through common law doctrines developed by the courts, in particular the doctrines of unreasonable restraint of trade and undue influence.

3. As currently drafted Article 15 is too uncertain as to its scope. One quality that business values above all else is certainty. For example, how can a rights owner possibly borrow against, or securitise existing rights to fund further investment if the rights in question are susceptible to devaluation. Similarly, the application of Article 15 to successors in title (in Recital 42) will render it impossible for any purchaser of rights to properly value the assets they are acquiring. The Directive does not contain any proposals for the compensation of successors in title for the reduction in worth of its investment in the event of a value transfer to an author under Article 15. It could conceivably end the market for the trading of music publishing contracts as it would become impossible to ascribe a meaningful value to any given contract.

We are at the disposal of the IPO to discuss the terms of the general music publishing contracts in detail if this is helpful.

**Article 16 Dispute resolution mechanism**

We are concerned that the factual uncertainties created by Article 15 on the contract adjustment mechanism are exacerbated by the dispute resolution mechanism. Voluntary alternative dispute resolution procedures still require legal and professional expertise; this creates considerable expense for all parties involved in dispute resolution. We also refer to the alternative dispute resolution mechanisms already provided within the system of collective management, Articles 33 onwards Collective Rights Management Directive.

## II. Regulation on online broadcasting transmissions and retransmissions[1]

1. We urge the IPO to challenge this proposal. We are very concerned about the proposed Regulation on online broadcasting transmissions and retransmissions. The Impact Assessment published by the European Commission does not provide anywhere near sufficient evidence of a positive impact on the market to justify the extension to ancillary online services. We have seen nothing to suggest that the arguments put forward by music publishers to the 2015 consultation have been properly considered. In particular, we challenge the value of further statutory interference given that the relevant parties, (i.e. public sector broadcasters, composers, music publishers and collecting societies) have already agreed and implemented a Memorandum of Understanding in 2014 which sets out governing principles relating to the licensing of specific online services. This Memorandum of Understanding is working satisfactorily and is providing clear definitions of broadcast-related online activities), administration of the rights (e.g. best practice on accounting) and distribution of the royalties; As such there is simply no need for further legislation which as always carries the inherent risk of distorting the market.

[1] https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-laying-down-rules-exercise-copyright-and-related-rights-applicable-certain

2. In and of themselves each of the principles in the proposed Regulation is inappropriate in a competitive market.

- The application of Country of Origin for broadcasters' ancillary online services
- The application of mandatory collective management for certain types of digital retransmission services

However, taken together, the Country of Origin principle and mandatory collective licensing operate to deprive rights holders of the ability to voluntarily determine their route to market. Where broadcasters are seeking to develop multi territory online services they are competing directly with digital services. To the extent that broadcasters benefit from different treatment to those services the result would be a distortion in this important and still nascent market.

3. In the event that the Regulation is adopted as currently envisaged then we cannot overstate the importance of Article 2 (2) which defines the parameters for the payment to be made to rightholders, including features of the ancillary online service, the audience, and the language version. In particular, the requirement to consider the audience based on "country of destination" pricing is absolutely key if rightsholders are to stand any chance of obtaining fair commercial value for the exploitation of their rights in any given territory and limit the risk of forum shopping by broadcasters whilst maintaining the important safeguards providing for country of destination pricing and the option of contractual overrides. We particularly welcome the recognition of the importance of contractual freedom in the Impact Assessment which (as it says*) "is expected to facilitate the development of the market without disruption of the existing business models and distribution strategies."*

4. Further the Regulation must be consistent with the principle of rightholders' choice, as embodied in Article 5 Collective Rights Management Directive and Recital 9 Information Society Directive. It is paramount that, as regards satellite and cable retransmissions, the collective management organisations involved provide clear and comprehensive data on the flow of royalties and their respective deductions. It is important that collective management organisations operate in a competitive environment for the benefit of the rightholders whose rights they administer.

5. As far as the objective of the Regulation to address alleged clearance problems by broadcasters is concerned, we refer to Articles 24 onwards of the Collective Rights Management Directive which deals with multi-territorial licensing of online rights in musical works by collective management organisations. This Directive establishes the mechanism to address any of the issues raised on multi territorial licensing.

- Broadcasters' ancillary online services. We disagree with the claim that the extension of the Country of Origin principle for ancillary online services of broadcasting organisations will lead to wider availability of programmes across different European member states. There is no evidence as to whether the principle of "country of origin" for the act of communication to the public by satellite under the 1993 Directive had any impact on the clearance of copyright and related rights for cross-border satellite broadcasts. Indeed, our experiences of the original Satellite and Cable Directive suggest the opposite; the application of Country of Origin to satellite broadcast has not delivered a proliferation of multi territory broadcast services.

The most prominent broadcast services in each member state are generally not available internationally despite the Country of Origin principles under that Directive.

We note that digital online services which are licensed voluntarily on country of destination principles (and are not covered by any statutory licensing regime) are generally available internationally. In our view, this confirms that market driven solutions are the most effective and that further legislation is likely to be at best ineffective and at worst disruptive. Additionally, the Country of Origin principle, if limited to the European Union, does not reflect the international nature of digital online services.

- Digital retransmission services. Compulsory collective licensing as envisaged by the Regulation is anti-competitive. In the case of music it clearly conflicts with the so-called GEMA categories developed by the European Commission in 1970. These categories have underpinned subsequent ECJ/CJEU decisions and statute (e.g. Collective Rights Management Directive). The proposed Regulation conflicts with these established principles and we are concerned that it may constitute the thin end of the wedge if its underlying principles are extended to other related areas in future.

  Further, mandatory collective licensing, as a concept, infringes the freedom of right holders to exploit their intellectual property as they see fit and as such breaches their fundamental rights laid down in Article 17(2) of the EU Charter of Fundamental Rights and Freedoms, as well as the specific provisions in the WIPO Internet Treaties of 1996.

6. Country of Origin principles ignore the basic commercial realities that the impact of a service on the market is where it is consumed not where it originates. As mentioned above, Country of Origin encourages unjustified forum shopping by licensees, a "race to the bottom" by Collective Rights Management organisations and unanswered questions in relation to services that originate outside of the EU. The undesirable incentives and the market distortions created by Country of Origin principles are the reason for the recent changes to the treatment of VAT on online services which now follows country of destination rather than Country of Origin principles.

We note that Country of Origin principles are diametrically opposed to the recent Regulation on the online portability of cross border content services. In order to facilitate portability of services the Regulation looks at the country of residence of the recipient of the services rather than the country from which the services originate. A Country of Origin principle creates undesirable and unnecessary confusion in this context.

**Proposed Directive and Regulation implementing the Marrakesh Treaty**

We welcome the timely implementation of the Marrakesh Treaty for visually impaired people by the proposed Directive and Regulation. The MPA has been offering a licensing scheme for print impaired people since 2002 in the UK, offering access to music. Our only comment relates to commercial availability which we recommend to be introduced in the European proposals implementing the Marrakesh Treaty (c.f. Article 4 (4)).

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**About the MPA Group:**

The MPA group represents the UK music publishing sector; it consists of:

The **Music Publishers Association** ("MPA") which is a trade association representing and safeguarding the interests of its members, who are UK music publishing companies.

The **Mechanical-Copyright Protection Society Ltd** ("MCPS") which licenses mechanical rights to music users, collects fees and distributes royalties to its 20 thousand, mostly unpublished, writer members and 6.5 thousand publisher members who in turn represent tens of thousands of writers;

**Printed Music Licensing Ltd ("**PMLL") which manages licences, on behalf of over 75 print publishers, for the copying of printed sheet music in schools and distributes royalties to its members; and

**Independent Music Publishers European Licensing** (IMPEL) which acts on behalf of music publishers for the licensing and administration of the mechanical rights in their Anglo American repertoire for pan-European (and wider) online activities.

www.mpaonline.org.uk