

EU copyright reforms—providing fair compensation for authors and performers

06/04/2017

IP & IT analysis: The EU has released a draft report on proposals for a new draft Directive which attempts to update European copyright rules in light of constantly evolving technologies. Dr Ananay Aguilar, of the University of Cambridge, who has just completed a four-year Leverhulme-funded project on music performers' rights, their history, use, management and reform, answers some questions on the draft directive.

What do the proposed provisions provide for?

The transparency obligation under article 14 of the [Draft Directive on Copyright in the Digital Single Market](#) (the draft Directive) provides that authors and performers are duly informed of the specificities of the exploitation of their works and performances by their contractual counterparts. This article formalises voluntary transparency statements already in place world-wide, such as the Fair Digital Deals Declaration proposed and subscribed to by the World Independent Network (WIN) and the subsequent Code of Conduct for the French Music Industry. As such, article 14 of the Draft Directive has been welcomed by independent labels that have subscribed to such statements.

However, critics say that the article is unnecessarily limited by Articles 14(2) and (3) of the draft Directive, especially considering that current technological developments offer inexpensive tools to warrant transparency for all the relevant parties. These paragraphs make the obligation subject to, first, a proportionality assessment between the value of the revenue and the administrative burden resulting from the obligation and, second, the 'significance of the contribution' to the overall work or performance. By limiting the obligation in this way, critics say, Article 14 of the draft Directive would benefit only a minority of high profile authors and performers. The draft copyright report by MEP Comodini Cachia published on 10 March 2017 ([2016/0280\(COD\)](#)), still awaiting committee decision, further limits article 14 of the draft Directive by adding that only authors and performers 'who are in a contractual relationship where there are ongoing payment obligations' are due this type of information. This would explicitly exclude session musicians who have assigned their rights to their contractual counterparts and receive extra-contractual payments for their collectively managed equitable remuneration rights. Conversely, the Comodini draft report includes two additional amendments that demand the information to be 'accurate' and that also informs on 'modes of promotion', as well as on 'modes of exploitation, revenues generated and remuneration due'. The latter addition would offer authors and performers insight into how and to what extent their work and performances are promoted and not simply uploaded onto a streaming service.

The contract adjustment mechanism under article 15 of the draft Directive offers authors and performers the possibility of adjusting a contract they entered into when their bargaining power was low so that the new terms offer them an appropriate remuneration commensurate with subsequent success. The article thus acknowledges that authors' and performers' low revenue level may be linked to unfair contractual terms and, in this sense, it has been welcomed by these stakeholders. However, the article has been subject to considerable controversy. From the perspective of authors' and performers', it does not acknowledge the difficulties of bringing such a claim to contractual counterparts with greater bargaining power, including for example, the high cost of engaging in such a dispute and the risk of compromising future engagements. The Comodini draft report offers an amendment that addresses some of these problems, by allowing individual artists to be represented by their relevant organisation. From the perspective of record labels and producers, the breadth of the wording represents contractual uncertainty. They argue that this is because investment in new artists involves large advances and promotion costs, which depend on a rise in 'revenues and benefits derived from the exploitation of the works or performances' (article 15) in order to be recouped. Also, record labels and producers make the point that the profits from successful artists largely get reinvested in new ones that may not be successful. This means that, if every successful artist gets paid the maximum possible share from the revenues from their recordings, investment in new acts will be reduced. To address this, the wording has since been amended by the Comodini draft report, by adding the word 'net' to the above phrase. This, in turn, further limits the chances of an artist's success in the case of a dispute.

Article 16 of the draft Directive provides for the creation of a voluntary, alternative dispute resolution procedure for disputes related to obligations arising from articles 14 and 15. Such procedure is generally preferred over litigation, but there are questions about who would preside over such procedure.

What is the Fair Internet for Performers campaign?

The Fair Internet for Performers campaign was launched in May 2015. Behind this campaign are four international organisations representing 500,000 musicians, actors and dancers—AEPO-Artis (the European association of performers' collective management organisations), EuroFIA (the European branch of the International Federation of Actors), FIM (the International Federation of Musicians) and IAO (the International Artist Organisation of Music, which represents featured artists).

The campaign seeks to secure fair remuneration for performers when their recorded performance is played on streaming and other on-demand services offered by digital service providers such as Spotify and YouTube. This would be achieved through the European copyright system with an addition of an equitable remuneration right to the already existing exclusive making available right. The cost of this right would be borne by digital service providers, instead of record companies as is the case with the communication to the public right, which remunerates performers for broadcasting and public performance of their recorded performances ([section 182D](#) of the Copyright, Designs and Patents Act 1988). The main argument for the introduction of this legal instrument is the lack of performers' bargaining power to exploit their exclusive rights with an equitable remuneration right managed by local collection management organisations (CMOs), performers would collectively secure a fair remuneration without having to negotiate with powerful contracting parties (AEPO-Artis et al 2015).

What are the next steps for the campaign and for the Draft Directive on Copyright in the Digital Single Market?

The campaign has struggled to push through its specific demands (ie implementing an equitable remuneration right for making available of performances) at the European level but has contributed to strengthening the perception that performers need a fair remuneration (see, for instance, page 53 of the Comodini draft report). Articles 14–16 of the draft Directive are a reflection of this, as is the willingness of the World Intellectual Property Organization Standing Committee on Copyright and Related Rights to debate this after the issuing of the Proposal for Analysis of Copyright Related to the Digital Environment presented by the Group of Latin American and Caribbean Countries ([SCCR/31/4](#)). It is therefore important that the campaign continues building momentum.

Grassroots support and public engagement would help the campaign. A particular difficulty lies in finding support from recognised artists, as these would normally benefit from the already existing exclusive making available right, and so would not like to see their income diminished by the operational costs of collectively managed equitable remuneration rights, although the participation of David Byrne in the WIPO discussion provides reasons for hope. Reaching sectoral support is another obstacle to the success of the campaign, as some of the most powerful stakeholders (including publishers, digital service providers and record labels) will not risk their revenue to be cut short. However, considering that the organising population is large, this could be achieved by supporting other campaigns, and working together for the longer-term benefit of the industry. A current example of such agreements would be to find common ground with the organisers of the so-called value gap campaign (currently addressed through article 13 of the draft Directive).

Finally, the campaign has strong arguments that it can draw upon. These include the renewed growth of the industry, a history of well-functioning equitable remuneration rights for communication to the public, and suggestions that passive services like radio (from which the equitable remuneration rights for communication to the public draws its strength) are in decline. Regarding the draft Directive we need to see how far the Comodini report gets.

What points should those working in the industry take from this campaign?

Despite considerable setbacks, the industry can count on this campaign for the long run. Policy-makers acknowledge that authors' and performers' situation needs to be improved and, for all its weaknesses, Articles 14–16 (and current discussions at WIPO level) reflect this position. The campaign is therefore likely to build on this momentum.

Behind the campaign is a large population of performers. Cross-sectoral support of this campaign would build the foundation for support on other campaigns, such as that of the value gap. Because cross-sectoral campaigns are more likely to achieve success, collaboration would benefit the entire industry in the long term.

Considering the financial and time cost of this campaign, organisers should consider whether an equitable remuneration right for making available of performances will benefit the performer population in the long run or whether other contractual mechanisms and collective management solutions strengthening the exclusive making available right could offer alternative, and perhaps stronger, solutions.

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Interviewed by Janine Isenegger.

*This article was first published on Lexis®PSL IP & IT on 6 April 2017. Click for a free trial of [Lexis®PSL](#).
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