



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 transfer of value

CISAC Secretariat

Overview

The way creative works (such as music, film and TV series, books and others) are accessed by users has seen a huge transformation in the last ten years. With the rapid evolution of the digital world, new business models and services have developed along with new channels of delivery.

This has also changed the licencing environment. Unlike in the past, creative content is no longer exclusively available from digital service providers that obtain a licence and pay for the content they provide. Such content is now widely available and shared through platform-based services. These platform services aim to attract and retain consumers by enabling them to access a vast volume of creative content, as well as information that may or may not be available in a different format elsewhere. These services do not create or invest in content. They aggregate or make available content that is already accessible on other websites or made available by the individual users of those platform services.

These platform services are at the heart of what is called the “transfer of value” (or “value gap”). The transfer of value arises because of a fundamental mismatch between the enormous value derived from creative works by digital services and the minimal value being returned to the creators of those works. While consumption of creative content is seeing explosive growth, the value of cultural and creative works is being retained by these platform services instead of being passed along to the creators.

These services fall into different categories, namely:

- Platforms allowing individual end-users to upload content (UGC or professional promotion platforms, e.g. You Tube, Dailymotion, SoundCloud, MySpace);
- Platforms allowing individual end-users to post links to cultural content or posting their own content to share with others on social media (Facebook, Hyves, Twitter, Musicyou, Snapchat, etc.);
- Platforms that select, aggregate and facilitate access to existing content on other websites and/or platforms through hyperlinking and/or embedding (TuneIn, iHeartRadio, NL FM, 6 Seconds, UberRadios, OnLineTV Lite, etc.);
- Platforms that offer software or dedicated search engines that help find, index and list content (dedicated to a specific type of cultural content such as books, images, videos, news and/or including cultural content as part of a general offer, e.g. Google, Yahoo, Bing, etc.).

These services combined form a very significant economic sector. Some of them are owned and operated by the world’s largest corporations. In Europe, the total market value of such platform services has been estimated at nearly 22€ billion in 2015¹.

By contrast, revenues being returned to creators by these services are disproportionately small. According to CISAC’s 2016 Global Collections Report, royalty collections by CISAC societies around the world for the use of creative content in the digital environment represented only 7.2% of overall collections. This low level of royalties is testament to the difficulties that authors face in licensing and enforcing rights. As a result, authors’ revenues from the digital market remain extremely low while the use of their content soars and online intermediaries generate huge revenues from it.

¹ “Cultural content in the online environment: analysing the value transfer in Europe”, Roland Berger, Paris 2015.

This transfer of value from creators to online intermediaries is the most challenging issue in today's digital environment. It needs to be urgently and effectively addressed as it impacts creators across the world.

The negative impact of the transfer of value

The transfer of value is causing substantial harm to rights holders. Creators are often unremunerated or inadequately remunerated. Some online intermediaries do not seek licenses from rights holders. Even for those who do have a license, the licencing conditions differ significantly from those of traditional service providers in terms of remuneration, thus jeopardizing the value of the rights.

This has resulted in an unfair advantage for certain digital players that have already secured a virtually unchallengeable market position. In turn, this enables them to abuse their position, particularly towards creators and rights holders.

A recent study revealed that, in Europe, 61% of the revenue of online intermediaries is based directly or indirectly on creative content². The lion's share of these revenues is captured by the biggest ad-supported video or audio services whose business are based on advertising income. For instance, more than 80% of YouTube visitors (the most used music service globally) use it for music³. Yet, according to the CISAC's 2016 Global Collections Report, revenues collected from these big Internet companies are far less significant than those coming from subscription services, despite their vastly greater user numbers⁴. For example:

- In the UK, the participating publishers and societies collected 46.4 million euros from subscription services but only 8.8 million euros from ad-supported audio services and 13.7 million euros from ad-supported video services.
- In Sweden, the amount collected from subscription services was 32.7 million euros, while only 2.3 million euros were collected by ad-supported audio services and 4.3 million euros from ad-supported video services.
- In France, collections from subscription services totaled 12 million euros compared to 1.0 million euros for ad-supported audio services and 4.3 million euros for ad-supported video services.

The issue – a market distortion that needs to be addressed

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 them.

Online intermediaries clearly make creative content available to others and, as such, communicate it to the public. Therefore, they should be responsible for obtaining individual or collective licensing solutions from the relevant rights holders and representatives for their actions. However, they manage to avoid doing so by abusing out-dated legislation or relying on loopholes and misinterpretations of existing laws.

² "Cultural content in the online environment: analysing the value transfer in Europe", Roland Berger, Paris 2015.

³ Music Consumer Insight Report 2016, Ipsos/IFPI

⁴ The revenues do not include payments as minimum guarantees or advances or legal settlements. As the first ever attempt to bring together society and publisher data, the figures are based on the best information available and may omit some revenues.

Specifically:

(i) they claim that they do not perform any "act of communication to the public" that needs to be authorised by rights holders. This is due to the wrong interpretation as to when an act of communication to the public takes place and as to who is responsible for it.

(ii) they claim the benefit of the liability exemption (so-called "safe harbour regime") under national or regional law, arguing that liability should apply only to their users (who uploaded the content) but not to them.

Both arguments have proven to be misplaced and contradicted by evidence.

The correct interpretation of the communication to the public right

The transfer of value is being sustained in part by a wrong interpretation of the right of communication to the public. This should be corrected.

The communication to the public right is internationally recognised under article 8 of the WIPO Copyright Treaty, which explicitly includes the right of making available to the public within its scope, meaning the right of exploiting the works online. In the European Union, the right is implemented by the InfoSoc Directive 2001/29, which fully recognises the exclusive rights of reproduction and communication to the public/making available right for online exploitation.

However, the scope and application of this right have been erroneously reshaped in several rulings across the world to the detriment of the rights holders. For instance, the conflicting interpretation of the definition of "public" and the addition of the criteria of "new public" by the European Court of Justice has led to a sort of "exhaustion" of the making available right with dramatic implications for the remuneration of rights holders.

The European Court of Justice based the interpretation of the concept of "public" on the definition of an old WIPO guide from 1978. WIPO's position has to be considered in light of the new Guide and 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.

Also, the effect of exhaustion of the right of communication to the public (in particular in its interactive making available form along with the related acts of reproduction) would result in violation of the relevant international and EU norms, under which such exhaustion does not exist. It might create serious conflicts with the normal exploitation of works and objects of related rights and would prejudice in an unreasonable manner the legitimate interests of authors and rights holders.

The real scope of the safe harbour regime

Safe harbours are being wrongly applied to certain digital platforms

Safe harbour provisions were intended to exempt online intermediaries from copyright 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, (e.g. in the EU as part of the E-Commerce Directive in 2000, in the United States in 1998 as part of the DCMA, and in 2006 within the Regulation for the Protection of the Right of Communication through Information Network (RPRCIN) in China), the main services that operated at that time were purely technical and passive services of storage, particularly because there was a limited availability of Internet access. At that time, many of the services that now hide behind these non-liability regimes did not even exist and were not foreseen. Thus the safe harbour provisions of such legislations were not intended to cover them.

A lot has changed since the introduction of safe harbour provisions in 2000. These safe harbour regimes have all outlived their usefulness. Since then, broadband networks have become almost ubiquitous and online consumption of creative content more and more prevalent. Where they apply, the “safe harbour” carve-out and its attendant case law have facilitated an exponential increase in the number of services that benefit from use of protected content without remunerating creators. The business model of those services fully, or to a significant extent, relies on the online dissemination of copyright-protected content to attract users to their services and thereby gain huge benefits.

It is clear that the manner in which creative content is used by intermediaries goes well beyond the mere conduit provided for under safe harbour provisions. It is also clear that the low level of royalties collected reflect the difficulties that CISAC societies have to enter into license with them.

What decision makers should do

There is an urgent need to re-balance this transfer of value in the digital market from creators to online intermediaries. It needs to be addressed in Europe and outside, as it impacts all creators across the world. The digital market must be built on proper monetisation of creative works and sustainable business models that offer a financial return for all stakeholders. Creators are at the origin of this value chain that produces growth, employment and cultural diversity.

To ensure the sustainability of the system, it is essential that the value be fairly shared with those who create and invest in new content. This can be achieved by fixing the legal framework to prevent it from being abused to the detriment of the creative sector.

Specifically, decision makers should do the following:

1. **The active role of online intermediaries in the communication to the public should be acknowledged.** In particular, the hosting safe harbour regime should apply only to genuinely passive and neutral online intermediaries. Thus, it should not apply when the service plays an active role in the communication of works (for example, by adapting, presenting, displaying, selecting, organising, promoting copyright works). In this case, they should have an obligation to seek licenses from rights holders and fairly remunerate creators for the exploitation of their works.
2. **The scope of the exclusive right of “communication to the public” should be clarified** according to the provisions of the WCT and to the definition of “public” lay down in the WIPO glossary. Such clarification would aim at avoiding distortions in the application of the right in the Courts, which hamper the ability of creators to receive a share from online uses. A particular emphasis is needed on hyperlinks in relation to copyright protected content, bearing in mind the recent decision of the European Court of Justice in the Svensson case. This ruling introduced a new criterion for a need of “new public” which significantly limits the scope of application of this right and denies the ability to collect from many online services.

These measures would also help to restore fair competition between online services. This is especially relevant in markets where many digital service providers - such as “pure players” (e.g. iTunes) and “traditional broadcasters” acting online (e.g. NRJ) - already seek licenses and remunerate rights holders. These services suffer substantially from the unfair competition by some online intermediaries acting as “free riders”, which hide behind safe harbour regimes to avoid obtaining a license from the rights and paying remuneration.

Thus, addressing the liability regime of online intermediaries would benefit all DSPs by levelling the playing field. It would help to expand a healthy, competitive and strong digital market where all stakeholders would benefit from better regulation.

A step in the right direction: the copyright proposals of the European Commission

On 14 September 2016, in line with the digital single market strategy, the European Commission presented a legislative package for the modernisation of the EU copyright rules, including a new Directive on Copyright in the digital single market.

This draft Directive includes provisions intended to rebalance the transfer of value, which currently benefits these platforms services to the detriment of cultural content creators.

The transfer of value provisions in the draft Directive concern only the online platforms that store and provide to the public access to works or other subject-matter protected by copyright or related rights uploaded by their users, the so-called user-uploaded content services (UUC services) like YouTube, Dailymotion, and SoundCloud, which have become the main access to cultural content online.

These provisions intend to clarify the rules that should apply to copyright-relevant acts of those UUC services and to provide some new obligations for them by introducing:

1. A clarification that UUC services communicate works to the public and lose their safe harbour status when they play an active role.
2. A clarification of what must be considered as an “active role”. For instance, optimising the presentation of the uploaded works or promoting them, irrespective of the nature of the means used.
3. A clarification that those UUC services that communicate copyright-protected works to the public, and thereby go beyond the mere provision of physical facilities, are obliged to conclude licensing agreements with rights holders, unless they play a passive role.
4. A clarification that those UUC services storing and providing access to large amounts of content, even when they play a passive role, should take appropriate and proportionate measures to ensure protection of works, such as implementing effective technologies.
5. An obligation for UCC services storing and providing access to large amounts of content to put in place, in cooperation with rights holders, measures to ensure the functioning of licensing agreements concluded with rights holders or to prevent access to works identified by rights holders on their platforms.

A number of service providers already implement such technical tools, but these provisions will enable introducing measures to prevent unauthorised content from being uploaded. Moreover, in the event of an agreement, better financial conditions may be negotiated by rights holders whose works will have been identified. They benefit from a better monitoring of the outcome of such agreement (transparency).

As defined in the CISAC Position Paper on the EU “Copyright Package” ([SG16-1097](#)), CISAC societies support the initiative of the European Commission and consider that its proposal goes in the right direction by recognising the value of creation in the Digital Single Market.