

Letter to Members States on behalf of Europe's creative sectors: Barriers which
impede the Copyright Reform from achieving its goals (Draft Copyright Directive)

9 October 2018



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Dear Member States' representatives,

We share a real concern about the potential damage that could be caused to our sector by some aspects of Article 13 – the so-called Value Gap provision – of the Proposed Directive on Copyright in a Digital Single Market (the Directive). With Trilogue negotiations now underway, we urge you to consider the below elements, which are potential barriers which will impede the copyright reform from achieving its goals and the effective functioning of existing copyright law.

Should any one of these elements be adopted in the final Directive, the Value Gap provision would harm existing copyright protection, fall foul of international treaties and the fundamental right to protection of property, and potentially cause complications with ongoing cases at the CJEU (see reference below), thereby negating the original purpose of the provision altogether. We address each concern individually below:

- **Introducing a liability privilege for Online Content Sharing Service Providers (OCSSPs) that demonstrate best efforts to take and keep content down (as notified by rightholders, another red-line addressed below).** This provision establishes a liability privilege for OCSSPs even when they infringe exclusive rights and exploit protected works to the detriment of rightholders. The OCSSPs potentially benefitting from this liability privilege are large, commercial, active players with the exclusive goal to monetise content. Effectively, this liability privilege will facilitate the availability of more infringing content online, depriving rightholders from any recourse to enforce their legitimate rights. The law is clear: an unauthorised act of communication to the public constitutes an infringement of rights protected by copyright law and renders the offender liable.
- **Shifting the obligation to identify and notify infringing content onto rightholders.** An act of communication to the public of protected content by anyone other than the rightholder requires the rightholder's authorisation, otherwise its availability must be prevented. It is the responsibility of the unauthorised entity wanting to exploit/monetise protected works to either get permission or prevent its availability. Shifting the responsibility to rightholders to identify and notify already available works nullifies the entire clarification that OCSSPs communicate to the public, which is supposed to confirm responsibility. Finally, placing the burden on the holder of the exclusive right alters the effective functioning of copyright law in an unprecedented manner, undoubtedly in contravention of the Berne Convention's Article 5(2). This shift in obligation will streamline the availability of infringing content and drastically diminish exclusive rights.
- **Outlawing content identification measures.** This provision is especially questionable when combined with the above and the below. In combination, they effectively shift the responsibility for protected content exploited online from OCSSPs to rightholders and from effective and uncontroversial technologies like Content ID to humans. It would be impractical to force tools like Content ID to identify, already at the point of upload, when exceptions to copyright should apply (see next point as well). This would roll back the best practices of over a decade and constitute a retrograde step in new law.

- **Elevating exceptions into rights.** Exceptions do not constitute rights in themselves. Elevating exceptions into rights and establishing a right of action for content covered by an exception would undermine the current, carefully balanced and well-functioning system which provides for the simultaneous protection of content and the opportunity for users to assert uses covered by an exception.

A solution for the Value Gap should ultimately benefit right holders, or at least not harm them (compared to the status quo), and not preempt the outcome of pending Court of Justice cases looking at the issue of the responsibility of OCSSPs under current law.

We thank you for the consideration of this letter and are available to meet at your convenience on this crucial topic.

Signatories

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