



25 April 2018

Proposal for a Directive on Copyright in the Digital Single Market:

Authors and rights holders urge Member States and the Council not to favour online content sharing platforms over Europe's creators or culture

Authors and rights holders call to resolve fundamental issues

Dear [insert name],

As representatives of cultural and creative sectors across Europe, Creativity Works! would like to bring to your attention the Bulgarian Presidency's harmful proposal on the Copyright Directive.

The legislative debate on the proposed Copyright Directive has been progressing relatively slowly, but for a good reason: copyright is a fundamental right protected by national constitutions and the European Charter on fundamental rights¹. It safeguards livelihoods while encouraging creativity and innovation. In turn, this safeguard spills over positively to Europe's culture, economy, employment and innovative spirit. While there might be a sense of *copyright fatigue* in the air implying that it is time to "move on," it is of paramount importance to prioritise substance over speed.

We are Creativity Works!, a leading European coalition of the cultural and creative sectors. We represent writers, screenwriters, video game developers, broadcasters, book publishers and retailers, cinema operators, sports organisers, picture agencies, music and film/TV producers, publishers and distributors. In this role, we are writing to urge Member States not to let copyright reform be torpedoed by short-sighted and short-term interests.

We respectfully call on Member States to reject recent harmful additions to the proposal that cancel out the progress made on copyright modernisation. We urge Member States to continue the substantive discussions at technical level, and reject any hasty and unbalanced agreement for a premature General Approach at the upcoming meeting on Friday 27 April.

We have highlighted our specific concerns in the annex.

We recall that copyright plays a central role for Europe's creators, cultural sectors and the economic business partners behind every creator. This proposal is a **once in a generation opportunity** to strike the right balance for our cultural and creative ecosystem and certain platforms giving access to creative works. The proposal as it currently stands however, is largely unbalanced and would undermine the EU acquis. Furthermore, it appears that it would primarily benefit Internet giants to the detriment of creative and cultural communities. In short, in the latest proposed text under consideration does not strike the right balance.

¹ Art. 17

Copyright provides the incentives to future creators and their business partners because it protects their creativity, innovation and financial investment. Ingenuity and financial risk-taking should be rewarded and encouraged, not punished. Europe's creators and their business partners deserve thoughtful consideration.

We thank you for your consideration and stand ready to engage with you in view of reaching a balanced solution.

Sincerely yours,
Creativity Works!

Creativity Works!.membership includes:

- Association of Commercial Televisions in Europe (ACT)
- Bundesliga
- Center of the Picture Industry (CEPIC)
- EUROKINEMA
- European Coordination of Independent Producers (CEPI)
- European and International Booksellers' Federation (EIBF)
- European Writers' Council (EWC)
- Federation of European Publishers (FEP)
- Federation of Screenwriters in Europe (FSE)
- Independent Music Companies Association (IMPALA)
- Interactive Software Federation of Europe (ISFE)
- International Confederation of Music Publishers (ICMP)
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- International Confederation of Music Publishers (ICMP)
- International Confederation of Music Publishers (ICMP)
- International Federation of Film Distributors' Associations (FIAD)
- International Federation of Film Producers' Associations (FIAPF)
- International Union of Cinemas (UNIC)
- International Video Federation (IVF)
- La Liga
- MEDIAPRO
- Motion Picture Association (MPA)
- the Premier League
- Verband Privater Rundfunk und Telemedien e.V. (VPRT)

Our main concerns with regards to the current Copyright Directive proposal from the Bulgarian Presidency (as of 13 April, reference: 7927/18):

We would like to bring to your attention our specific concerns about the Bulgarian Presidency's latest proposal on the Copyright Directive, on (i) **the so-called "value gap" provision** (on Article 2, Article 13 and corresponding recitals), (ii) **exceptions** (Articles 3-5) and (iii) **out-of-commerce works** (Articles 7-9).

Value gap

- The current wording proposed by the Bulgarian Presidency on **the so-called "value gap" provision does not fulfil its intended purpose** of allowing rights holders to better determine the conditions for – or to prevent – the use of their content. On the contrary, the new Article 13.4 **would undermine current enforcement efforts and further strengthen the role of some already powerful content sharing platforms**. It would limit existing rights and create a special copyright liability privilege for these platforms. This runs counter to the very spirit and objective of Article 13. Worse it runs counter to international law and EU obligations
- **It would limit the scope of the right of communication to the public** by incompletely applying Court of Justice of the European Union (CJEU) case law and referencing in Article 13 only certain criteria

developed by the Court. This approach would roll-back the CJEU's case law, which has repeatedly confirmed that a broad interpretation of the right of communication to the public (CTTP) is **necessary to achieve the main objective of the Copyright Directive, which is to establish a high level of protection for authors and rights holders.**

- CW! recalls that the exclusive right of communication to the public, including the making available right, as enshrined in EU law (and further clarified by the Court), has emerged as the bedrock for the creation, financing, licencing and protection of content, as well as its ultimate delivery to consumers in the online environment. Article 13.4 would contravene international law.
- **“Best efforts” roll back responsibility.** Today, these platforms are already required to take measures with respect to specifically identified and notified works. **The current proposal would leave rights holders worse off than under current law!** There will be negative consequences for Europe's cultural and creative diversity. Furthermore, it puts into question an entire eco-system that employs 11 million people. **Article 13.4 should therefore be deleted.**

Exceptions

- It must be clarified that **exceptions cannot be combined with each other**. It should be made clear that, consistent with the three-step test and international copyright norms, each exception and limitation to an exclusive right under copyright and related rights is to be interpreted restrictively as to its own beneficiaries, scope and purpose. While each exception in the proposed Directive might be justified on its own merit and with a concise scope, beneficiaries of all these exceptions **must have lawful access to the copyright protected content**. This means *acquired* access with the consent of the right holders. Moreover, any legislative proposal that undermines the ability of right holders to control and deploy TPMs to manage the access to and use of their content in the on-demand space would severely limit their ability to protect their investment. It would also likely deprive consumers of new services with innovative interactive functionalities that have been enabled by TPMs. Therefore, **it is necessary that Article 6(4)(4) of the 2001/29 Copyright Directive continues to apply in the on-demand space**. A specific reference to Article 6(4)(4) should therefore be included in Article 6 of the Proposed Directive.
- Specifically, on **exceptions for Text Data Mining**, the optional TDM exception is unacceptable: it has no specified beneficiaries, no obligation to store securely and to delete copies and no identified purpose. We call for a **deletion of this proposed new exception which (appears to) benefit primarily internet giants** to the detriment of the creative sector.

Out-of-commerce works

- In our view, the Bulgarian Presidency should consider all existing systems and reflect specificities of each creative content sector. We note that the definition of a **'never in commerce work'** first proposed by the Estonian Presidency in Recital 25, and now unfortunately endorsed by the Bulgarian Presidency, also includes unpublished works. This **goes against the respect of moral right of an author**, and against a basic principle of copyright legislation.