

Proposed Copyright Directive – Value Gap Provision

Audiovisual and Sports Sectors Proposed Way Forward for the Value Gap Provision: European Commission proposal or music-sector specific approach

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As representatives of the audio-visual and sports sectors active across the European markets, we are extremely concerned about the direction of ongoing trilogue discussions on **Article 13 (the so-called Value Gap provision)** of the proposed Directive on Copyright in the Digital Single Market.

Recent proposals would undermine **current case law of the Court of Justice of the European Union (CJEU) which already makes it clear that online content sharing service providers (OCSSPs) communicate to the public¹ and are not eligible for the liability privilege of Article 14 E-Commerce Directive²**. In addition, the proposal would further muddy the waters of jurisprudence in this area in light of the German Federal Court of Justice (Bundesgerichtshof) referral to the CJEU in a case involving YouTube/Google and certain rightholders, addressing this very issue. The referral took place by a recent decision of 13 September 2018³.

Recall that the initial goal of Article 13 was to codify the existing case-law in a way that would enable right holders to better control the exploitation of their content *vis a vis* certain OCSSPs which currently wrongfully claim they benefit from the liability privilege of Article 14 E-Commerce Directive.

However, unfortunately, the Value Gap provision has mutated in such a way that **it now strengthens even further the role of OCSSPs to the direct detriment of right holders and completely undermines the status quo in terms of the EU liability regime**. Some of the options proposed for discussion at trilogue level indeed wrongfully undermine current law and weaken right holders' exclusive rights by, among others: creating a new liability privilege for certain platforms that have taken specific steps to avoid the availability of infringing copyright content on their services (but have failed to do so effectively), and conditioning protection of copyright online on right holders bearing the full burden of identifying and notifying copyright infringing content to platforms. These would constitute gifts to already powerful platforms, and would *de facto* constitute the only real change to the current *status quo* in legal terms, thus improving the position of platforms, but not of right holders.

To conciliate the opposing views in the European Parliament and Council on the issue of mitigation of liability of OCSSPs, and in light of the pending referral before the ECJ, **we propose a balanced and sound solution consisting in returning to the principles of the initial Commission proposal with regards to OCSSP liability with reference to the existing jurisprudence of the CJEU.**

We strongly believe that this reasonable approach would have broad support, including in the rightholders community⁴ and could at the same time conciliate different views of Member States and different political groups in the European Parliament, without the need to give powerful active platforms the gift of a new liability shield which goes beyond the proposed copyright reform.

If, on the contrary, any new safe harbour/"mitigation of liability" would be part of a final trilogue agreement, **we would respectfully urge you to disapply the entire value gap provision to our respective sectors**. This could simply be achieved by making Article 13 specific to musical works and phonograms, as was the case, for example, in Title III of the Collective-Rights-Management-Directive of 2014⁵, by adding the following paragraph to Article 13:

"Article 13 applies with regards to the communication to the public and making available of musical works and phonograms, without prejudice to Article 3(1) and (2) of Directive 2001/29/EC and of Article 14 of Directive 2000/31/EC to any other sectors."

¹ Case C-527/15 *Stichting Brein v. Filmspeler*; Case C-610/15 *Stichting Brein v. Ziggo BV*

² Case C-324/09 *L'Oréal and others* (The CJEU clarified that a platform is not passive and can therefore not benefit from the Article 14 ECD liability privilege when they optimise the presentation and/or promote the content on their platform.)

³ Case C-682/18 *Google e.a.*

⁴ The approach was initially welcomed by many right holders, including from the music industry – see Letter of 5 April 2017 "Creative sector calls on European Parliament to solve Value Gap/Transfer of Value in Copyright Directive Report" saying "[The Commission's proposal for a Directive on Copyright in the Digital Single Market provides a meaningful solution to this issue.](#)"

⁵ See Article 2.2 of Directive 2014/26/EU: "*Title III and Article 34(2) and Article 38 apply to collective management organisations established in the Union managing authors' rights in musical works for online use on a multi-territorial basis*"

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