



26 March 2018

RE: Creativity Works! underlines necessary improvements in proposed Copyright Directive

Dear Attaché,

Creativity Works!, a leading European coalition of the cultural and creative sectors, is concerned with the direction taken in discussions on the Directive on Copyright in the Digital Single Market, in particular on the consequential provisions on Article 13, as well as Article 3-5 and Articles 7-9.

Exceptions (Articles 3-5)

On proposed exceptions, it must be clarified that, as a general matter, exceptions cannot be combined with each other (this would be allowed under Recital 20). Rather, 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. Moreover, 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 rightholders. We ask Member States to address this and to provide reassurance that copyright will remain an incentive for creation and for investment in production, marketing and distribution.

Specifically, on **exceptions for TDM** (Article 3 and 3a), CW! would like to highlight that:

- licensing agreements should prevail over the TDM exception (Article 3);
- commercial uses should be excluded from the scope of Article 3 (as it is the case in all the MS that already have a legislation on this matter: France, Germany and the UK).

We appreciate that Article 3 includes an obligation to securely store and permanently delete any resulting downloads within a reasonable space of time after conducting a TDM exercise. The additional, optional TDM exception (Article 3a) is unacceptable: it has no specified beneficiaries, no obligation to store securely and to delete copies and no identified purpose. It would apply to all content and turn copyright on its head since copyright holders could only be protected by copyright law if they “expressly reserve” their rights. This proposal disregards fundamental concepts of international copyright law that drive creation and incentivise the investment that underpins that content creation. We call for a deletion of this proposed new exception which (appears to) benefit primarily internet giants to the detriment of the creative sector and ask that the Council adopts a more balanced approach that is consistent with international copyright norms, especially considering existing licensing solutions.

Regarding the exception for illustration for teaching (Article 4), we welcome the solution presented by the Presidency in paragraph 2, allowing for licences to prevail over the exception.

Regarding the exception for preservation of cultural heritage (Article 5), the exception must explicitly refer to the “sole” purpose of preservation (as the Commission text proposes). The proposals tabled in the Council delete the word “sole” which is problematic.

Out-of-commerce works (Articles 7-9)

Regarding out-of-commerce works (Article 7-9), CW! believes that the Bulgarian Presidency should consider all existing systems and reflect specificities of each 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.

As for Recital 25a relating to the determination of a status of an 'out of commerce' work, CW! reiterates that for reasons specific to the book sector, sampling – a solution endorsed by the Bulgarian Presidency – cannot be sufficiently accurate to determine the status of a work. Taking the book sector as the example, the following criteria should make up the conditions to determine the out of commerce status: (i) individual and diligent search, performed title by title and (ii) in the country of first publication of the book to determine the status, (iii) followed by licensing by the reproduction rights organization (RRO) that is duly representative for right holders.

Right of Communication to the Public (Article 13)

While we recognise the Council's determination to find a balanced solution to Article 13, we warn that the latest wordings would lead to a limitation on the scope of the right of communication to the public. The previous Presidency proposal incorrectly merged existing EU law liability principles to define when certain online platforms communicate to the public. From a copyright perspective, this approach appears to suggest that notification is a necessary determination of whether an act of copyright exploitation has taken place, or not.

However, under current European law, the question of a copyright infringement is independent from notification thereof. Rather, the obligation to take measures in respect of specifically identified and notified works is only relevant for determining whether platforms continue to qualify for the existing liability regime of the E-Commerce Directive – if they qualified in the first place. Such a limitation of the right of communication to the public, which compatibility with international copyright law is dubious, would seriously risk undermining rightholders' ability to license their works and enforce their copyright.

The latest Presidency proposal would now incompletely apply established case law by the Court of Justice of the European Union when defining under which circumstances certain platforms would communicate to the public. Moreover, it would create a special limited liability regime for online content sharing service providers ("OCSSP") who communicate to the public as it would exempt an OCSSP from liability when it has made "**best efforts to prevent the availability of specific unauthorised work or other subject matter for which rightholders have provided it with information**". This would create a specific special liability privilege for OCSSPs that is not neither necessary nor warranted.

We call on the Council to find a solution that keeps the scope of the important right of communication to the public fully intact. Exclusive rights, and particularly the right of communication to the public, are the bedrock for and serve as the driving force behind creativity and investment in development, production, marketing and distribution. This in turn drives Europe's job creation and economic growth. Eroding the value of exclusive rights would have a negative impact on creativity, investment and recoupment opportunities.

We thank you for considering our concerns. Should you have any questions or comments, we remain at your disposal.

Sincerely yours,

Creativity Works!