 Brussels, 27 February 2017

RE: Comments from Creativity Works! on MEP Marc Joulaud’s draft Opinion Report

Dear ,

Ahead of the Culture Committee’s consideration of MEP Marc Joulaud’s draft opinion on the Commission’s proposal for a Directive on Copyright in the Digital Single Market, we as Creativity Works!, a leading European coalition of the cultural and creative sectors, would like to share our initial analysis of Mr Joulaud’s draft report. Our diverse membership includes, broadcasters, writers, screenwriters, book publishers and retailers, cinema operators, sports organisations, picture agencies, music and film/TV producers, publishers and distributors.

We welcome the objective of the Rapporteur to acknowledge the “need for a high level of protection of intellectual property” (Amendment 37). We would also welcome that the following points be further clarified or strengthened

* **Value gap –** The “value gap” provisions are weakened in the draft report. This could result in a limitation of responsibility for certain platforms and dilute the value gap provisions.
* **User-Generated Content** (exceptions) – The introduction of a User-Generated Content (UGC) exception in the draft opinion is detrimental to investment in content, creates legal uncertainty and invalidates the value gap provisions.
* **Remote access** (exceptions) – The introduction of a remote access exception in the draft opinion is a disincentive for licensed services.
* **Illustration for teaching** (exceptions) – As this exception is being made mandatory, it is essential that the existing licences should prevail over the exception.
* **Text and Data Mining** (exceptions) – We support the obligation for research organisations to delete the reproduction of works once the text and data mining act has been carried out; but further clarifications are needed.
* **Technological Protection Measures** – TPM are key enablers of digital content services and their use should not be endangered.
* **Negotiation mechanism** should remain voluntary.
1. **Bridging the “value gap” requires platforms to play and pay fair**

We believe in the value of creativity, and we expect that platforms play fair too. Closing the widening “value gap” by clarifying that those who distribute or intervene in the distribution of creative works are active and responsible for obtaining copyright licences is a key objective of our coalition.

The draft opinion does not strengthen, but weakens the “value gap” provisions.

* The addition of a narrow definition of platforms in Recital 38 waters down the “value gap” scope, resulting in fewer platforms being covered by the proposal and in a limitation of responsibility for platforms (“*sufficiently active role* instead of *active role*”). On this basis, Amendment 28 to Recital 38 should be rejected.
* The scope of the “value gap” provisions now seem to be limited to cases where a “category of works significantly present on the platform” / “significant amount of the content is displayed on the platform” (Amendments 28 and 72). In our view, any platform engaged in communicating to the public should be obliged to seek licenses from rightsholders.
* The value gap provisions should be targeting activities, and not actors (Amendment 28).
* Amendments 28 and 72 seem to imply that if there is no licensing agreement sought by rightsholders, platforms are exempted from liability. Any service performing an act of communication to the public should be held liable irrespective of whether a licensing agreement is sought/obtained.
1. **Exceptions should mirror the “licensing first” approach**
* **Licensing for User-Generated Content works; there is no need for a new UGC exception**
* Licences already enable user-generated content to be made available on platforms and users’ own websites/blogs.
* Europe has witnessed the growth of DailyMotion, one of the most important UGC sites. DailyMotion is a signatory to the Automated Content Access Protocol (ACAP) which enables licensing through embedded permissions.
* UGC revenues account on average for around 80% of independent music companies’ revenue from YouTube.
* UGC has become a source of revenues for video artists and stand-up comedians for example.
* Against this background, who is to benefit from a UGC exception? Large online platforms will take advantage of it. This would run counter to the EU effort to close the “value gap”.

As a result, we believe Amendment 1 to Recital 5, Amendment 12 introducing Recital 21(b) (new), Amendment 13 introducing Recital 21(c) (new), Amendment 42 introducing Article 2 paragraph 4(b) (new) and Amendment 56 introducing Article 5(b) (new) (introducing a UGC exception) should be rejected. The Commission did not propose a UGC exception as it identified no market failure which could justify such an exception - we support the EC’s approach.

* **The introduction of a remote access exception would act as a disincentive for licensed services**

Amendment 85 of the draft opinion modifies Article 5.3.n of the 2001/29 Directive that permitted access to digitised copies within the premises of establishments, on dedicated terminals into an exception to the communication to the public. This exception would enable libraries to make digital copies of films, TV series and other copyright-protected content available to the general public. It would disincentivise rightsholders and audiovisual content service providers from commercialising such works as the library’s digital copy would compete unfairly with any licensed service offering the same content.

As a result, Amendment 14 to Recital 21(d) (new) & Amendment 85 to Article 17 (2)(b)(d) (new) should also be rejected.

* **Exception for the purpose of illustration for teaching**

We support Amendment 52 to Article 4 (introduction of “shall” instead of “may” provide for fair compensation). As this exception is being made mandatory, it is essential that existing licences prevail over the exception. In addition, it is absolutely crucial to limit the use of the works to “short extracts” and to exclude from its scope works that were designed for educational purposes.

* **Text and data mining**

We support the Rapporteur’s call for research organisations to delete the reproduction of works once the text and data mining act has been carried out (Amendment 44 introducing (a) to Article 3(2)). We believe that users should be required to guarantee that the copy of the content made in order to undertake the mining is securely stored. The public interest research organisations should provide information to rightsholders on how they store and secure the copies. Once mining has been performed, it should be a legal requirement that the copy is deleted.

But further clarity should be provided in the text:

* Recital 21(a)(new): The exception should not cover “commercial uses”
* Amendment 43 to Article 3(1): The notion of “lawful access” is too vague and needs to be clarified. For example: “lawful access with the consent of the right holders (or subscribed access)” would be clearer wording.
1. **Technological Protection Measures are key enablers of digital content services**

When discussing exceptions, we call on the CULT committee not to endanger the use of technological protection measures (TPMs) as defined in Article 6 of the 2001 Copyright Directive.

TPMs are digital technologies that enable access to authorised customers while at the same time preventing unauthorised access or use.

On-demand services are a significant and successful part of online distribution models, in particular transaction-based models or subscription models (such as Storytel and Izneo for the book sector; iTunes or Netflix in the audiovisual sector and DeepDyve for scientific, technical and medical publishing). They are all made possible by the use of TPMs. Limiting the use of TPMs would be detrimental for consumers as it would severely reduce the digital content offer.

The omission of Article 6.4.4 of the 2001 Copyright Directive from the text of Article 6 of the proposed Directive is, therefore, a cause for some concern. Article 6.4.4 is based on the contractual freedom of rightholders to protect their works, a fundamental principle of EU law, and it has successfully enabled the development of new business models and encouraged investment in the content sector on an unprecedented scale. Moreover, the non-application of Article 6.4.4 for an exception such as text-and-data mining could possibly make on-demand and other online services vulnerable to circumvention of TPMs for uses not covered by the exception, and would thus risk undermining the efforts of our and of other content industries to protect their content from piracy.

We consider that any legislative proposal that undermines the ability of rightholders to deploy TPMs specific to the management of access to their content when offered via on-demand services would limit their ability to invest in the development, production, marketing and distribution of content and to recoup the significant investments undertaken in this process. Rightholders’ ability to provide European consumers with a wide variety of content and means of enjoying access on multiple different commercial terms would be severely reduced.

1. **Negotiation mechanism** (Article 10) should remain voluntary

The audiovisual sector is an industry which requires high and risky investments. Audiovisual content distribution requires a good knowledge of the local market in order to find the best way and the best means of distribution for each type of content. The negotiation mechanism should remain voluntary in order to enable the industry to enable to thrive and continue re-investing in high quality content.

We kindly thank you for considering the above-mentioned points and remain at your disposal should you have any questions or comments.

Sincerely yours,



**About Creativity Works!**

Like-minded organisations, federations and associations from the European cultural and creative sectors have formed a coalition: *Creativity Works!*. Its objective is to foster an open and informed dialogue with EU policy-makers about the economic and cultural contribution made by creators and the cultural and creative sectors in the digital age. Members are brought together by a sincere belief in creativity, creative content, cultural diversity and freedom of expression.

**Members include: Association of Commercial Televisions in Europe (ACT); Center of the Picture Industry (CEPIC); EUROCINEMA; European Coordination of Independent Producers (CEPI);  [European and International Booksellers’ Federation (EIBF)](http://www.europeanbooksellers.eu/); 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 Federation of Film Producers’ Associations (FIAPF); International Federation of Film Distributors’ Associations (FIAD International Union of Cinemas (UNIC); International Video Federation (IVF); Motion Picture Association (MPA); International Confederation of Music Publishers (ICMP); Verband Privater Rundfunk und Telemedien e.V. (VPRT); MEDIAPRO; Bundesliga; and the Premier League/Sports Rights Owners Coalition,); La Liga.**

Find out more about the coalition at [www.creativityworks.eu](http://www.creativityworks.eu).

You can follow us on twitter at [@CreativityW](https://twitter.com/CreativityW)