

The EU Directive on Copyright in the Digital Single Market

The Trilogue Negotiations have entered a key phase. As negotiations on Article 13 are in full speed, we know that it is necessary to be open to compromises in order to progress. However negotiators should never lose sight of the original objective of the Directive that is to leverage the bargaining power of rightsholders in all creative sectors providing content to the online ecosystem.

In the light of the latest proposals, this position paper outlines the main concerns of the Image Industry with regards to Articles 13 and 13 b)

Who we are?

CEPIC represents hundreds of Picture Libraries and Agencies representing hundreds of thousands of photographers whose core business is the direct licensing of visual content off-line and online. Acting as right holders, Picture Libraries and Agencies license digital asset for all kinds of commercial uses, to newspapers, magazines, advertising, broadcasters, etc. CEPIC members are continuously adaptive towards innovative technology solutions for the growth in digital enterprises and have developed sophisticated digital platforms to both market digital content online and provide digital access to images. Amongst CEPIC members are global players such as Getty Images, Magnum Photos and Alamy, fine arts libraries such as Bridgeman Images, historical archives such as Roger-Viollet and Fratelli Alinari, news photo syndication such as Le Figaro, news agencies such as Belga, TT and DPA as well as representatives for European trade associations AEAPAF, BAPLA, BLF, BVPA, SAB, and SNAPIG.

CEPIC has been a member of the International Press and Telecommunication Council (IPTC) since 2005 and is a founding member of its Photo Metadata Working Group.

It is essential that the EU copyright Directive improves the negotiating power of *all* creative sectors online

We strongly support the aim of the Directive to re-establish a level playing field between stakeholders in the online eco-system, encourage cooperation and incentivize the use of technology, thereby laying the ground for the development of copyright friendly business models. The value gap provisions in Article 13 are essential to this aim.

From experience to date, smaller rights holder groups in individual countries have struggled to obtain any meaningful dialogue with OCSSPs. ID systems implemented by the main OCSSPs for some content such as music and video have not, for example, been available to rightsholders in the Image industry. To be fair to all rightsholders and creators, there should not and cannot be disproportionate and unequal treatment to redress the value gap – no-one set of rightsholders should be left out of this provision.

The EU Copyright directive has been written for all rightsholders, large and small.

The Directive has not been written for rightsholders in only one or two sectors which happen to have political bargaining power, but to improve the bargaining power of rightsholders across all industries. The Directive introduces uniform *measures*, enforceable in each Member State to redressing the inequality between OCSSPs that make available third party unlicensed copyright works on a large-scale and rightsholders, so that they are not forced to rely on litigation to enforce their rights.

CEPIC and their members are therefore extremely concerned that the Commission at this final stage of negotiation is now introducing new concepts that do not feature in their original proposal, were never discussed before and would inflect the spirit of the Directive in a direction unfavorable to rightsholders, in particular unfavorable to smaller rightsholders. It is essential that the level of cooperation shall be the same in all cases. Otherwise, smaller right holders will end being left out of any benefits of this provision. This does nothing to introduce a fair online environment for creators, one of the chief aims of the Directive.

These concepts introducing discrimination are:

- **Differentiating between “low and high value content” or introducing concepts such as “activity” that “does not generate significant revenues”**

Such a provision would discriminate between industries and between content within each industry.

- Legally speaking, it is questionable whether this differentiation is compliant with the Berne Convention requirement that the enjoyment and the exercise of copyright/authors’ rights should not conform to any formality.
- Economically speaking, such a differentiation would pose a significant risk to smaller rightsholders. Images often have a low monetary value per unit. Business models have been built on creating value from multiple sales of the same image. Excluding images would therefore severely damage the market and lower income expectations of photographers. In addition this will not incentivize any technological development for smaller industries (image industry).
- The value of content evolves over time. An innocuous photograph may go “viral” and acquire significant value overnight. The recent proposals appear to disregard the fact that the value of IP lies in its potential, rather than necessarily in the investment in it. If, however, the new proposals treat “value” to be equivalent with “investment” we submit that such value-based mechanism would breach the fundamental principles of automatic and indiscriminate protection afforded by copyright/ droit d’auteur in the EU.
- When it comes to the use of technology, such a differentiation would entrench the present de facto situation: Google for example has started developing ID systems for music and video but has ignored the Image industry for many years. The legislator must ensure they support smaller industries by including all right holders.

- The **introduction of a UGC exception** (under Point B. of the non-paper issued 03.12.18) was absent in the original proposal of the Directive. It was later discussed in committees but discarded in the final vote due to many practical difficulties. Such a provision would only strengthen the position of platforms and further undermine the business model of the Image industry without any significant gains for the users.
- **The mention of “non-availability”** (under draft 13.4 of the non-paper issued 11.12.18) is ambiguous and could easily be misinterpreted by OCSSPs to mean ‘any’ appearance of images identified as infringements could unintentionally include the exact same images that have been licensed thereby applying a blanket “non-availability” approach. It is imperative that OCSSRs work with image industry rights holders to apply the right approach that works for our industry and not simply introduce a process that heralds unintended consequences.

A compromise on mitigation measures should not be at the cost of watering down the value gap provisions

A recent letter signed by a handful of large organisations in the AV and Sports sector suggests that “**mitigation measures**”, introduced in the Council text and now at the core of negotiations, should only be applicable to the Music sector. We disagree in the strongest terms. However, we share the concerns of the AV and Sports industries about the dangerous path the Value Gap provision is taken which seems to diverge substantially from its initial goal to enable right holders better control the exploitation of their content vis a vis certain OCSSPs.

As social media platforms need incentive to do anything differently, the Image industry, like the AV and Sports industry, is concerned that most recent Trilogue working papers issued by the Austrian presidency introduces a new exemption from “**liability**” based on a wide ranging set of untested and therefore ambiguous factors.

The proposed mitigation measures tend to favour large right holders to the detriment of smaller ones. Ironically, the right holders who actually require a higher degree of protection may end-up being left out from the benefits of this provision.

If “mitigation measures” were to be included, they must not weaken right holders rights and thereby create another liability privilege to benefit OCSSPs. Mitigation factors would need to be kept narrow, clear and objective, or else risk ending up with a less favourable situation than currently. It must be noted that the current position, shaped laboriously by the CJEU and national courts on a case-by-case basis, is by no means clear or uniform across the Member States. It was precisely this lack of uniformity, and the resulting lack of legal certainty that gave impetus to the proposed legislative changes. They must go further than status quo. Provisions should promote the development of virtuous business models and incentivize the use of technology. There is a huge potential innovative technology market for small and middle-size enterprises in Europe.

It is imperative that the negotiators in the Trilogue stick to their mandate which is to reconcile the three versions of the text. The Value Gap provisions have been endorsed by EU member States on 25 May 2018 and overwhelmingly by MEPs at the plenary session of Parliament on 12 September. As such, these measures should be included within the final text of the Directive with no removing and further diluting.

Art. 13 b) on Automated image referencing will not replace sound and balanced liability requirements for platforms.

We commend the European Parliament for having recognized the specific problem of images shared online through image search engines and the acknowledgement that there is currently a value imbalance between the huge value created by the sharing of images online and the value going back to the right holders. What the image industry experiences is rather a “value block”, considering that, unlike music and video rightsholders, there is currently zero value flowing back to image right-holders from the extensive unauthorised use of their images by online platform.

However, in the present circumstances, we don’t see this provision as solving the problems of the Value Block online.

- It is an imperfect “ersatz” to solution for the “framing” practices of image search engines as, not only would it leave the “framing” loophole unaddressed for all other websites and platforms.
- **Direct licensing remains a favoured licensing scheme** in the Image Industry. This is a market dominated by small and many micro players. What these players foremost need are strong liability provisions to leverage their bargaining position in the face of larger players.

We remain confident that the right balance will be found in the coming days/weeks between the council & parliament text and that smaller industries and rightsholders will not be forgotten in the Value Gap provisions.

CEPIC, 12.12.2018