

EDiMA policy brief on Article 13 of the Directive on copyright in the Digital Single Market

The aim of Article 13 is to solve a supposed value gap, when collecting societies collected a record 8.6 billion Euros of revenues in 2015 (CISAC) and when the revenues effectively collected by record labels have consistently increased in the past years (IFPI, RIAA). Yet Article 13 would impact dozens of platforms, hundreds of startups and European businesses, and over 100 million Europeans who uploaded user generated content to the Internet in 2016. In particular, Article 13 and its accompanying recitals would radically change the current EU framework for European consumers and businesses:

1. It reinterprets the liability protections in the e-Commerce Directive, excluding most of the services that it was designed to protect;
2. It obliges digital services to conclude agreements with rightholders for user uploaded content, such as photos or videos shot with a smartphone;
3. It imposes mandatory filters - by way of content recognition technology—in order to uphold these agreements;
4. It gives rightholders unilateral powers to interfere directly in the operation of online services, by gaining access to information about and requesting the implementation of highly complex and costly technologies;
5. It provides no effective or workable safeguard against abuses or overbroad uses, whether for online services or for users.

EDiMA calls upon lawmakers to delete Article 13 and to focus on measures that ensure better transparency for artists and consumers, and that protect citizens and businesses from the overbroad use of filtering technology.

EDiMA believes the continued success of the creative and technology sectors depends on a legal framework that incentivises creativity, investment and innovation. We believe the internet is a boon for growth and has led to an explosion of creativity in the EU, fueling growth in creative output, jobs and revenues for the creative sector¹.

While we welcome the initiative from the European institutions to reform the EU's copyright framework, we regret that the Commission's proposed Directive on Copyright in the Digital Single Market (DSM) misses the opportunity to put the EU forward as a global leader for innovation and the creative industries. EDiMA is particularly concerned with Articles 11² (publishers' neighboring rights), 13 (filtering and licensing) and 3 (text and data mining)³. This document outlines the implications of the Commission's proposed Article 13.

¹ See Technology is Culture (2016), <http://www.techisculture.eu/wp-content/uploads/2016/10/Technology_is_Culture_1010.pdf>

² See EDiMA and DIGITALEUROPE briefing on the Directive on copyright in the Digital Single Market, the Impact of Article 11 – publishers rights, <http://europeandigitalmediaassociation.org/pdfs/latest_news/EDiMA%20DE%20Policy%20Brief%20o%20Publisher%20Rights.pdf>

³ EDiMA position on the proposal for a Directive on Copyright in the Digital Single Market, <http://www.europeandigitalmediaassociation.org/pdfs/latest_news/EDiMA%20copyright%20leave%20behind%20final%20wout%20ES%20reference.pdf>

The obligation to license, monitor and filter all content online would cripple innovation and undermine free expression for millions of EU citizens and businesses

Licensing and filtering requirements under Article 13 (and accompanying recitals) effectively subjects the activities of millions of EU citizens online to a prior approval and monitoring by rightholders.

Article 13 targets a large section of European citizens. In 2016, over 117 million Europeans, or close to a third (29%) of EU citizens aged between 16 and 74, uploaded self-created content to websites (Eurostat, 2016, see table below for geographical spread).

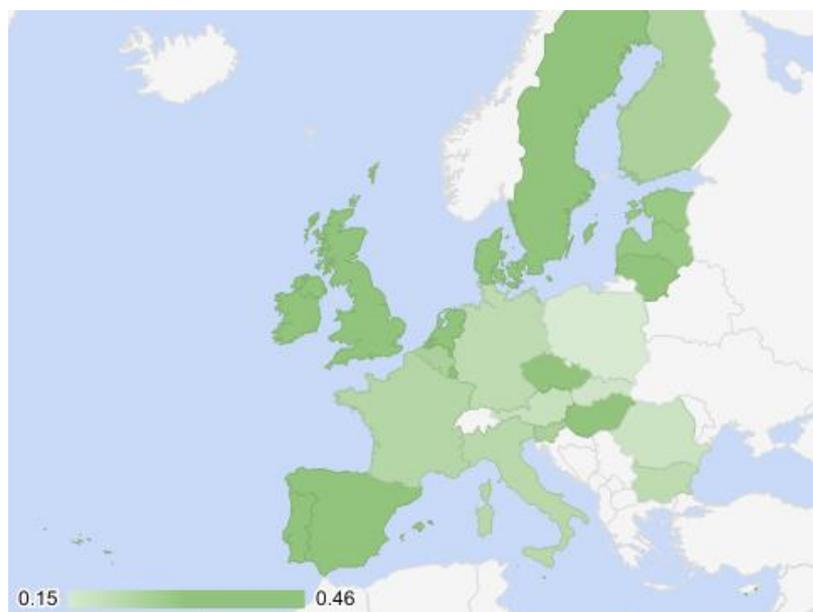


Table 1 - Share of Europeans aged 16 to 74 who uploaded self-created content to a website in 2016. Range: 15 % to 51%.

Article 13 requires targets a broad range of online services which store and allow the sharing of user uploads to conclude agreements with rightholders and implement “stay down-take down policies” through the use of content recognition technologies. It would reach well beyond a handful of streaming services and impacts nearly any hosting service, from eBay to Wikipedia. Virtually any services (whether B2B or B2C) that have an element of “hosting” would be excluded from the scope of the e-Commerce liability regime and be communicating works to the public. Cloud infrastructure services and internet service providers are also likely to be impacted.

Social networking	    
Professional networking	 
Photo sharing	   
Video platforms	    
Audio platforms	  
Cloud services	  
Blogging	  
E-commerce	  
Wikis	  

Table 2 – non-exhaustive list of services covered by Article 13, as provided under the initial Commission proposal.

Such an obligation is not a special monitoring obligation but a general monitoring obligation that requires the monitoring of the activities of all users.

The reasons the e-Commerce Directive was established in the first place is to preserve and foster innovation and the fundamental rights of citizens. Once platforms become liable for the actions of their users, those operators have a government-mandated requirement to clamp down on users' freedom of speech and freedom of expression.

Undermining the e-Commerce Directive and the broader digital economy

As it has been repeatedly shown, notably in an open letter to EU institutions by forty European Academics⁴ and another from twenty-eight different civil society organisations⁵, the copyright proposal fundamentally undermines freedom of expression, freedom to conduct a business as well as the e-Commerce Directive. It does this by:

- Creating a general obligation to license and monitor European citizen's behavior on a wide range of online services which are used to share content, contrary to Article 15 of the e-Commerce Directive. The sheer breadth of services concerned and the

⁴ <<https://medium.com/eu-copyright-reform/open-letter-to-the-european-commission-6560c7b5cac0#.o3gp5qkx1>>

⁵ <<https://stopthecensorshipmachine.net/>>

number of citizens involved leaves no doubt on this point.

- Applying licensing and filtering requirements to services that are covered by the specific liability regimes of the e-Commerce Directive, including Article 14.
- Changing the interpretation of the e-commerce Directive: Recital 38 selectively quotes the Court of Justice, omitting to mention that knowledge of illegal activities is the key criteria in the application of the e-commerce Directive.

As a strong supporter of the Digital Single Market, EDiMA views the e-Commerce Directive’s stable liability regime as essential to ensuring growth and innovation online. In undermining this key piece of EU legislation, the proposal severely impairs Europe’s efforts to create an environment where innovation and competition can thrive⁶.

Fact check: revenue growth, not “value gap”

EDiMA supports an evidence-based policy making process. To this end, we have contributed hard evidence that digital services were driving consumer welfare, a more diverse and vibrant creative production and increased revenue for the creative sector (See EDiMA, Technology is Culture). Collecting societies collected a record 8.6 billion Euros globally in 2015⁷, the majority of which is paid by European consumers. Major labels have seen consistent revenue growth in recent years (see below), with streaming revenue growing a 45% in 2015 alone⁸.

Record labels suggest that there is value gap in the amount of money that consumers pay for music: the so-called “retail value” of music. **EDiMA disagrees with the major record labels’ premise that getting consumers to pay more is a worthy policy goal. What matters, from a creative sector perspective, is the amount paid to record labels (“wholesale value”), which in consistently increasing.** The latest data available shows the difference between retail value – which has been flat in recent years – and labels’ wholesale revenue, which have consistently grown since 2012⁹.

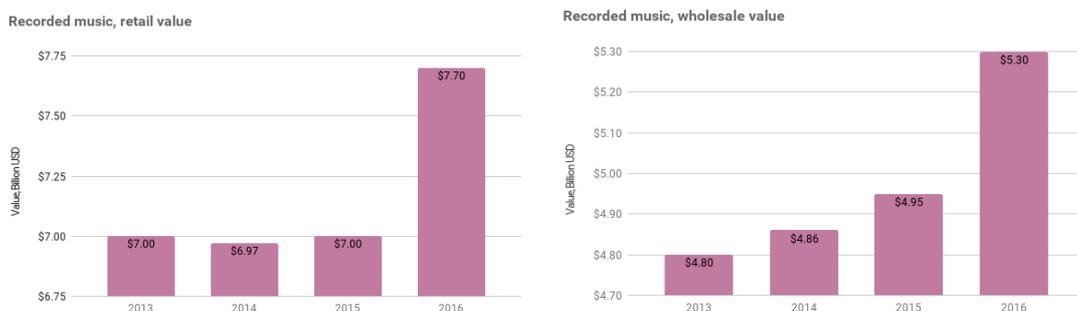


Table 3 – retail value (amounts paid by consumers) v retail wholesale (amounts made by labels), source: RIAA, US.

A market where consumers have more and better options to listen to music, in accordance

⁶ Further info on the economic impact can be found in EDiMA’s 2015 study “Online Intermediaries, Impact on the EU economy” <<http://www.europeandigitalmediaassociation.org/pdfs/EDiMA%20-%20Online%20intermediaries%20-%20EU%20Growth%20Engines.pdf>>

⁷ CISAC, 2016 <<http://www.cisac.org/Newsroom/News-Releases/Global-royalties-for-creators-reach-record-high-of-8.6-billion>>

⁸ IFPI Global Music Report, 2016 <<http://www.ifpi.org/downloads/GMR2016.pdf>>

⁹ News and Notes on 2016 RIAA Shipment and Revenue Statistics, RIAA 2016 <<http://www.riaa.com/wp-content/uploads/2017/03/RIAA-2016-Year-End-News-Notes.pdf>>

with their wishes and their financial means, and where record labels make more revenue, is a well-functioning market. It is a market where the lower distribution and production costs of music in the Internet era is passed on to both consumers and record labels.

Filtering technologies are costly, their effectiveness is limited and they cause harm if misused

The limits of content recognition technologies are increasingly well-documented. A recent study ([The Limits of Filtering: A look at the functionality and shortcomings of content detection tools](#), 2017), highlights that:

- Content filtering is expensive, contrary to the data provided in the Commission impact assessment;
- Content filtering can be circumvented and is of limited effectiveness in fighting piracy;
- Content filtering is not available for many types of content and files.

In sum, such obligations would establish new barriers to entry for many players including startups and app developers, with limited benefits even in fighting piracy. As a recent study on the impacts of the copyright Directive for startups has outlined, “Being exposed to an enhanced risk of liability for copyright infringement and broadened burdens of rights management and rights clearance, it will be much more difficult to find investors for new start-up platforms. In the absence of sufficient investment and financing options, ideas for new platforms may be absorbed by major players in the online market. The final result of the reform may thus be further market concentration and less information diversity.”¹⁰

More importantly, no content-filtering technology will ever be able to assert the correct ownership of rights or detect whether a use is permitted under a copyright exception. Misused content-filtering technology promises to stifle not just innovation but also the exercise of freedom of expression and freedom to conduct a business.

Blanket licensing requirements on open platforms means no open platforms

Licensing requirements across the board are as damaging as filtering requirements. The breadth and diversity of content uploaded to online platforms means it is theoretically and practically impossible to license. The fact that most content uploaded to platforms is created by consumers – including 170 million EU citizens in 2016 – means that it is not justified. Making platforms liable for user uploads simply means that uploads will have to be restricted to content for which licenses can be checked.

The best way to increase remuneration for creators is to allow creative industries to thrive in the digital environment, allow the free flow of data across the creative value chain and thus ensure remuneration is appropriately shared amongst creators by means of the various business models on offer to them. If licenses are a precondition for operating a platform, creators will have fewer opportunities to build successful careers.

How do we fix it?

In order to maintain and foster a healthy, competitive and innovative online environment, it is critical to:

- Assert the prevalence of the e-Commerce Directive;

¹⁰ <<https://drive.google.com/file/d/0B7NZMIL3kj5qcndnNFIPNGI5MOU/view>>

- Assert fundamental rights including freedom of expression, due process and the rule of law, freedom to conduct a business;
- Maintain the conditions for the internet as a place where open platforms give EU citizens and businesses the freedom to express themselves or conduct their business;
- Provide workable safeguards for users and online services against overbroad or otherwise misguided use of licensing and monitoring requirements;
- Promote measures that foster a true Digital Single Market for EU citizens and businesses, not measures that create new barriers to innovation and fragment the market territorially.

We look forward to working with the EU institutions to strengthen the Digital Single Market to ensure that Europe forges a copyright reform that is future-proof and supports the interests of all beneficiaries.

EDiMA, the European association representing European and global online platforms and other innovative tech companies operating in the EU with members including: Airbnb, Amazon EU, Apple, eBay, Expedia, Facebook, Google, King, LinkedIn, Microsoft, Mozilla, PayPal, TripAdvisor, Twitter, Yahoo!, Yelp.

Contact us

info@edima-eu.org

@EDiMA_EU

+32 262 619 90

www.edima-eu.org

Annex 1: What do Recital 38 and Article 13 mean?

Recital 38:

- The recital outlines that services which consumers use to share creative content (copyright-protected works) are themselves “communicating to the public”.
- Services that are “communicating to the public” must negotiate a license for all the works that are uploaded by consumers, irrespective of whether a copyright exception applies.
- The recital severely narrows down the scope of the hosting liability regime, curtailing CJEU case law (e.g. Scarlett/Sabam).

This recital is discordant in that it both acknowledges the liability provisions laid out in Article 14 of the e-Commerce Directive, and summarily removes them through a new interpretation of “active” vs “passive” hosting. The scope of application is well beyond a handful of large audiovisual streaming services, and would impact the range of online services that exist exactly because such services do not require a high barrier to entry into the market, and there is (currently) no obligation to police its users.

Article 13 *“Use of protected content by information society service providers storing and giving access to large amounts of works and other subject matter uploaded by their users”*

- 13(1): Casts a wide net capturing nearly all online service providers that store and provide access to “large amounts” of works “or other subject matter” uploaded by users (User Generated Content, or UGC) and obliges them to conclude agreements with rightsholders for the use and enforcement of copyrighted works.
- In order to uphold these agreements, platforms are also obliged to implement monitoring measures, “such as the use of effective content recognition technologies”.
- The service providers will also be asked to provide rightsholders with information on the functioning and deployment of the measures, including reporting on the recognition and use of the copyright works.
- 13(2): In recognition that the obligations in paragraph (1) may have unintended consequences on users’ freedom of expression (particularly on UGC sites), service providers will also have to implement “complaints and redress mechanisms” in the case such disputes over the application of measures occur.
- 13(3): Member States will facilitate cooperation between the online services and rightsholders through stakeholder dialogues to define the technology behind the measures that will be applied in paragraph (1). It ignores the important role that users and other stakeholders such as security and academic experts play in such dialogues.

The culmination of this Article would put the service provider in a position of:

- Negotiating with rightsholders what content can be used, through “agreements” such as licenses;
- Developing tailored monitoring and filtering technologies to ensure that unauthorised content and enforcement of any infringements will be carried out on the platform;
- Service providers themselves developing redress mechanisms in the inevitable instance that authorised and completely legal content and creations are removed;
- Rightsholders and States will have the ability to define technological standards for how and what technologies are used on their platforms.

While many of EDiMA’s members already work closely with rightsholders, and as a sector we strongly believe in ensuring that creators are fairly remunerated for their works, this Article is undoubtedly crafted to favour a handful of major rightsholders, at the expense of a well-functioning Digital Single Market. In particular, this would negatively impact **competition and innovation** - as smaller and new online services would likely not be able to comply with such obligations or bear such a legal burden for rights clearance and enforcement, and **the free expression of those that use our platforms** - as online services will be incentivised to remove or prevent UGC all together on their platforms, ultimately stifling expression and creativity in the Single Market.