Brussels, 27 October 2017

Dear Sir/Madam,

We the undersigned are writing to express our concerns regarding the ongoing Council debate on the proposed Directive on Copyright in the Digital Single Market. In particular, we would like to highlight the importance of discussions on the so-called right of communication to the public (CTP) and the e-Commerce Directive 2000/31/EC (eCD), in the context of Article 13 and Recital 38.

We agree that concerns raised by Member States and echoed by the Council Legal Services are justified and need to be addressed. The shortcomings of the proposal regarding lack of legal certainty in particular ought to be addressed. The questions recently put to Member States by the Presidency are thus a step in the right direction.

However, the role of the eCD and the scope of the right of CTP raise wide-ranging implications which will apply to a broad range of digital services in a manner that goes well beyond the scope the European Commission's proposal. We therefore stress that these considerations must be born in mind, not just for the future of the proposed Directive, but also for the future of digital services in a workable Digital Single Market for the 21st century.

As such, **we the undersigned ask that the questions raised by the Presidency are given due weight and consideration, in open consultation with stakeholders as Member States see fit. We furthermore stress that due to the extent of the impact that this may have, any clarifications made for the purposes of the proposed Directive on Copyright in the Digital Single Market must not change nor supersede the e-Commerce Directive.** To this end, below we outline our initial responses to the following questions as raised in Council:

1) Whether the copyright proposal should supersede the eCD, although this is not part of the Commission's proposal;
2) Whether the notion of CTP should be changed or broadened, although the European Commission did not propose to amend this right under Directive 2001/29;
3) Whether there is a need to provide for a stand-alone provision for the removal of certain content in Article 13 and how this could function in light of Article 15 of the e-Commerce Directive.

We remain at Council's disposal for further discussions on these crucial issues.

Yours Sincerely,

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**Annex**

1) *Should the proposed Copyright Directive supersede the eCD, although this is not part of the European Commission's proposal?*

Throughout discussions we have highlighted that Recital 38 is discordant in that it both acknowledges the liability provisions laid out in Article 14 of the eCD and summarily removes them through a new interpretation of "active" vs "passive" hosting, while completely ignoring the key element of Article 14: knowledge - as confirmed by the CJEU in *L'Oréal/eBay*. We understand that Council has recently discussed whether it should be clarified how services which CTP ought to be considered under Article 14 of the eCD, or should this consideration be left to the courts to carry out on a case-by-case basis. Given this lack of legal clarity in the proposed Directive, the concerns raised by Member State delegations and the Council Legal Service are justified and ought to be addressed.

However, in doing so it must be born in mind that the eCD has underpinned the development of digital services in the EU. **As such, we stress that where any clarification of this relationship is made for the purposes of Article 13, it must be stated in the text that the proposed Directive will not alter nor override the e-Commerce Directive. We furthermore advise that Recital 38 needs to be redrafted to reflect the core aspect of the CJEU's reasoning – knowledge - in order to ensure the functionality of a case-by-case application of the CTP, Article 14 of the eCD and Article 13 of the proposed Directive.**

2) *Does the CTP need to be broadened,* although the European Commission did not propose to amend this right under Directive 2001/29?

What constitutes an act of CTP under Article 3 of the InfoSoc Directive has been widely debated in the CJEU over the past few years. By stating that the mere act of storing and/or providing access to copyright-protected works leads to a CTP, Recital 38 is oversimplifying years of complex jurisprudence (the CJEU has never found that it was enough to show that a service "gives access" to establish an infringement). In oversimplifying well-established case law, Recital 38 also omits the various elements that have formed part of the Court's considerations over the years, namely that the communication is made to a "new public", with "knowledge" and a potential "profit-making motive" as a rebuttable indicator for knowledge. Without these elements, Recital 38 misconstrues the concept of CTP in a dangerous and far-reaching manner.

**Given the wealth of case law on CTP and the clear shortcomings of the Recital, we are of the opinion that it is unnecessary to broaden the CTP and would be irresponsible to clarify years of complex legal jurisprudence on the basis of a flawed Recital. Rather, we endorse the case-by-case approach of the CJEU for the implementation of Article 3 of the InfoSoc Directive - a workable approach which has been presented by the Presidency in Option A of its compromise text on Article 13.**

3) *Does Article 13 need to provide for a stand-alone provision for the removal of certain content and how can this function in light of Article 15 of the eCD?*

Bearing in mind that the Commission has repeatedly stated that it is not its intention to re-open the eCD, we believe that any stand-alone provision in Article 13 of the proposed Directive must be voluntary and include stringent user safeguards in order to comply with Article 15 of the eCD.

While some have maintained that the proposal in Article 13 on content recognition technology is compatible with the eCD - as the measures described therein are not so stringent as to be considered to be imposing a "general monitoring obligation" - we support the opinion of both civil society and the academic community that this is not the case. Regardless of whether the type of content that must be filtered has been identified by rightsholders and is specific in nature, Article 13 will still require online service providers to filter the content of *all* its users against the catalogue provided by rightsholders – which was deemed to be incompatible with Article 15 of the eCD by the CJEU in *Sabam/Netlog NV*.

**In order for such a stand-alone provision to effectively function and remain compatible with the e-Commerce Directive, we advise that Article 13 ought to be amended so that the use of any "filtering measures" are voluntary in nature and limited in scope**.

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