

## EDiMA Position on Proposal for Copyright in the Digital Single Market

EDiMA believes the continued success of the creative and technology sectors depends on a legal framework that incentivises creativity, investment and innovation. Unfortunately, the Commission's proposed Directive on Copyright in the Digital Single Market (DSM) fails to achieve these aims and is a missed opportunity to put the EU forward as a global innovation leader. Unfortunately, the Directive even falls short of meeting the overall objective of contributing to the DSM.

### Neighbouring rights for press publishers – Reinforcing big brands and undermining media pluralism

EDiMA continues to strongly caution against the introduction of a new right for publishers into EU law and is concerned by the apparent disregard for the strong evidence showing the risks for the online ecosystem and media pluralism arising from the neighbouring rights proposal. The Commission's proposal only captures the opinion of one industry (the publishing industry), and in fact only a subsection of that industry, which has already advocated for the adoption of similar concepts in Germany and Spain, leading to overwhelmingly negative results for consumers, innovation, news publishers and media pluralism<sup>1</sup>.

Numerous and repeated pieces of evidence confirm that there is **no** market failure that needs to be addressed between online services and press publishers, because of the current reality that is in fact a win-win situation between these services. This was highlighted by the Regional Court of Berlin<sup>2</sup>, the Spanish Competition authority (CNMC)<sup>3</sup>, academics, copyright experts and many other observers<sup>4</sup>. News aggregators and online services grow the market for news and send valuable new readers to new sites. As a result, some publishers are starting to find success online. Axel Springer reports that more than half of revenues for 2014 were generated from digital activities and an increase in profits of over 13%. They also facilitate access to information on the internet, including to online press publications, as recognized by the German Constitutional Court<sup>5</sup>.

Furthermore, the European Commission's assessment of the impact of a new EU-wide neighbouring right has completely overlooked many of the side effects for internet users and the longer-term implications for the development of a well-functioning digital single market and the ability to link. In practice, the German and Spanish attempts have dented media pluralism and only reinforced leading brands, to the detriment of smaller players (on the side of online platforms and publishers)<sup>6</sup>. Finally, according to the European Commission, a key problem is the legal uncertainty related to the licensing negotiations and enforcement of authors' rights.

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<sup>1</sup> See EDiMA's The Impact of Ancillary Rights in News Products, available here: <http://edima-eu.org/pdfs/EDiMA%20-%20Impact%20of%20ancillary%20rights%20in%20news%20products.pdf>

<sup>2</sup> <http://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2016/pressemitteilung.481361.php>

<sup>3</sup> See Comisión Nacional de los Mercados y de la Competencia, PRO/CNMC/0002/14, 16 May 2014

<sup>4</sup> See Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law, 28 November 2016 ; see also Prof. Raquel Xalabarder Report 'The remunerated statutory limitation for news aggregation and search engines proposed by the Spanish Government ; its compliance with international and EU law' .

<sup>5</sup> See German Federal Constitutional Court – 1 BvR 2136/14

<sup>6</sup> See AEEPP/NERA, *ibid*, available here: <http://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEPP%20%28VERSION%20FINAL%29.pdf>

However, systematic licensing and enforcement problems are hardly an effective argument to push for the introduction of new intellectual property rights<sup>7</sup>.

EDiMA Recommendations:

EDiMA calls for the deletion of article 11 of the proposed Directive.

EDiMA calls for concrete evidence of the enforcement problems that publishers face. If such a problem exists, we are keen to find and support the most effective and proportionate solution. The neighbouring right is neither.

### **Monitoring obligations and upload filtering**

In an open letter to EU institutions, forty European Academics have stated a clear, simple, yet fundamental, understanding of what the proposed Directive actually does<sup>8</sup>:

- Article 13 of the proposed copyright Directive contradicts Article 15 of the e-Commerce Directive;
- Recital 38 creates other problems of interpretation as it adopts a very narrow reading of Article 14 of the e-commerce Directive and the category of hosting providers as providers of intermediary services;
- Article 13 of the proposal imposes a general monitoring obligation upon a great number of providers of intermediary services.

We cannot over-emphasise the relevance and correctness of this statement. Despite continued assertions to the contrary, it is essential to acknowledge that the copyright proposal fundamentally undermines the e-Commerce Directive and creates obligations to monitor consumers' behavior on a wide range of online services which are used to share content.

As a strong supporter of the Digital Single Market, EDiMA views the e-Commerce Directive's liability regime as essential to ensuring continued growth and innovation online. The digital services built on the basis of this liability regime are a pillar of economic growth<sup>9</sup>, including for the creative sector<sup>10</sup>. They drive increased consumer welfare and they underpin productivity growth (and the competitiveness) of European workers. In undermining the e-commerce Directive, the proposal severely handicaps Europe's efforts to create sustained and meaningful economic growth.

EDiMA strongly rejects the undocumented allegations that the creative sector is losing out from the transition to digital. Digital generates value for the creative sector, the very opposite of a value gap. We regret that the wealth of evidence available to document the growth of the creative sector – which we have compiled

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<sup>7</sup> See Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law, 28 November 2016

<sup>8</sup> "40 academics from all over the EU express their concern for the Copyright reform", 30<sup>th</sup> September 2016, available here: <https://medium.com/eu-copyright-reform/open-letter-to-the-european-commission-6560c7b5cac0#.w8luhpyl1>

<sup>9</sup> See EDiMA study Online Intermediaries Impact on the EU Economy, 2015, available here: <http://www.europeandigitalmediaassociation.org/pdfs/EDiMA%20-%20Online%20intermediaries%20-%20EU%20Growth%20Engines.pdf>

<sup>10</sup> See Technology is Culture, 2016, available here: [http://www.techisculture.eu/wp-content/uploads/2016/10/Technology\\_is\\_Culture\\_1010.pdf](http://www.techisculture.eu/wp-content/uploads/2016/10/Technology_is_Culture_1010.pdf)

in our Technology is Culture briefing<sup>11</sup> – has been ignored. Not only are the creative industries growing, but they are growing thanks to digital investment and innovation that puts music and creative content in the hands of consumers, anywhere, anytime, increasing media consumption. Only recently it was revealed that **the music industry grew by close a billion USD in 2015 - a year-on-year rise of 941m USD or 4%**<sup>12</sup>. Collecting societies from CISAC distributed a record-breaking 8.5 billion USD in royalties. Major record labels' **revenue from streaming grew over 45%** last year,<sup>13</sup> prompting Pascal Negre, former CEO of Universal Music, to state that “the music industry is headed for another decade of growth”<sup>14</sup>.

While its very existence appears perilously undocumented, the “value gap” is still summoned to justify the destruction of the e-Commerce Directive through the backdoor and the general filtering of online services used by consumers to share content.

The current proposal, however, introduces mandatory monitoring measures that will not only hamper the growth of a diverse and innovative eco-system but also lead to overbroad filtering of user generated content and social media, disregarding the rights of businesses and of consumers, over-riding the EUCJ and ignoring the balance to be struck between the competing fundamental rights recognized under the Charter.

Article 13 requires providers of intermediary services which consist in the storage and provision to the public of access to large amounts of works or other subject-matter uploaded by their users to put in place measures to “prevent the availability on their services of works or other subject-matter identified by right holders” such as the use of “effective content recognition technologies.” Such an obligation is not a special monitoring obligation but a general monitoring obligation as it does require the monitoring of the activities of all users. This is incompatible with the fact that the only exceptions to the prohibition of general monitoring obligations need to be proportionate and based on a legitimate aim.

Recital 38 does not in itself seem to relate to the corresponding article but instead outlines fundamental changes to copyright and intermediary liability under the e-Commerce Directive.

1. Redefining “communication to the public” and licensing obligations: First, recital 38 outlines that services which consumers use to share creative content (copyright works) are themselves “communicating to the public”, not just consumers. This is a new extension of copyright. Services which are “communicating to the public” must take a license for all the works that are uploaded by consumers, irrespective of whether a copyright exception applies.
2. However: The recital severely narrows down the scope of the hosting liability regime, curtailing the case law of the EUCJ. Any hosting service which is not purely “dumb” (rental of disk space) would seem to be excluded from the scope of the e-Commerce liability regime and would be communication to the public and require a license for all the works uploaded by consumers.
3. Furthermore, Recital 38 adds to the confusion: By seeking to limit hosting to the mere provision of “facilities” and stating that anything beyond that would constitute a communication to the public and therefore require a licence. In fact, it’s hard to imagine how most services today would not be carved

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<sup>11</sup> Technology is Culture, *ibid*.

<sup>12</sup> Music Business Week, “The Global Music Copyright Business is Worth More Than You Think – And Grew By Nearly \$1bn Last Year”, 13<sup>th</sup> December 2016, available here: <http://www.musicbusinessworldwide.com/the-global-music-copyright-business-is-worth-more-grew-nearly-1bn-last-year/>

<sup>13</sup> IFPI Global Music Report 2016, available at <http://www.ifpi.org/downloads/GMR2016.pdf>

<sup>14</sup> Le Monde, 27<sup>th</sup> December 2016, “L’industrie musicale renaît avec le streaming”, available here: [http://www.lemonde.fr/economie/article/2016/12/27/le-streaming-fait-renaitre-l-industrie-musicale\\_5054273\\_3234.html](http://www.lemonde.fr/economie/article/2016/12/27/le-streaming-fait-renaitre-l-industrie-musicale_5054273_3234.html)

out of the e-Commerce Directive by this recital, which would exclude any service provider that “optimiz[es] the presentation of the uploaded works or subject matter or promot[es] them, irrespective of the nature of the means used therefor.” Just as importantly, it also seems to suggest that actual knowledge of whether or not an infringement has actually taken place is irrelevant.

In practice, voluntary measures that are adaptable to the business environment and the latest technological developments and that are directly targeted at reducing the demand for, and supply of, infringing content currently represent so far the most effective, flexible, and proportionate way to tackle commercial-scale infringements. The proposal would entirely eliminate this flexibility and adaptability.

EDiMA Recommendations:

Recital 38 should be removed as it does not serve the interpretation of article 13 but instead creates new and far reaching legislation – which a recital cannot do.

Regarding article 13, the impact of the monitoring obligation on fundamental rights should be fully assessed, and solutions which are the most effective and proportionate should be privileged to monitoring obligations.

The current proposal privileges rightholders at the expense of consumers’ interests. There should be checks on what rightholders can do and more clarify on what obligations there are under. While they enjoy extraordinary provisions such as having a say in the implementation of content management technologies – which they do not design or pay for – there is absolutely nothing to guard against rightholders mistakenly or abusively asserting rights in content which is not their own, or filtering content that is lawful.

Consumers’ interests should be recognized for a balanced proposal.

### Text and data mining

Text and data mining (TDM) is an area that Europe has yet to fully leverage. The ability to analyse large sets of data is a fundamental pillar of the data economy. The insights gained from this analysis provides unprecedented societal and economic benefits.

Maintaining that facts and ideas be protected by copyright goes against international legal standards as copyright protection does not extend to factual information *about* a work. Any copying in the context of TDM is incidental and does not result in any unreasonably harm to the legitimate interests of the copyright holder.

The proposal’s approach to limit a proposed text and data mining exception to only “public interest research institutions” is a step backward, not forward, in making Europe a competitive and innovative research environment for both public and private entities, and TDM should be permitted to any organisation with lawful access to data.

EDiMA Recommendations:

The concept that ‘beneficiaries of the exception’ basis for determining eligibility within recital 9-11 and Article 3 does not reflect the ambition of the Commission to make the EU a competitive environment for data innovation. Only through acknowledging that an exception on TDM must include both commercial and



non-commercial purposes will ensure a level playing field for European researchers (amongst Member States as well as in a global context), make Europe more competitive, and maximise the return on investment of public money.

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

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