

7 December 2018

**AUDIOVISUAL SECTOR PROPOSED WAY FORWARD FOR THE VALUE GAP PROVISION:  
NO NEW SAFE HARBOUR OR SECTOR CARVE-OUT**



As representatives of the audio-visual sector active across the European markets, we reiterate that we are extremely and increasingly concerned about the direction of ongoing trilogue discussions on **Article 13 (the so-called Value Gap provision)** of the proposed Directive on Copyright in the Digital Single Market.

In a letter of 1 December we alerted the three EU institutions that the texts under discussion would undermine current case law of the Court of Justice of the European Union (CJEU) which already makes it clear that online content sharing service providers (OCSSPs) communicate to the public<sup>1</sup> and are not eligible for the liability privilege of Article 14 E-Commerce Directive<sup>2</sup> (ECD). The proposal would further muddy the waters of jurisprudence in this area in light of the pending German Federal Court of Justice (Bundesgerichtshof) referral to the CJEU in a case involving YouTube/Google and certain rightholders, addressing this very issue<sup>3</sup>. The initial goal of Article 13 was to codify the existing case-law in a way that would enable right holders to better control the exploitation of their content *vis a vis* certain OCSSPs which currently wrongfully claim they benefit from the liability privilege of Article 14 ECD. Unfortunately, the Value Gap provision has mutated in such a way that **it now creates a new liability privilege for big platforms and therefore even further strengthens the role of OCSSPs to the direct detriment of rightholders.**

Last week, **we proposed a balanced and sound compromise solution** consisting in guidance on the issue of OCSSP liability with reference to the existing jurisprudence of the CJEU. This solution would ensure rightholder collaboration in furtherance of the deployment of appropriate and proportionate measures as well as addressing the potential liability of uploaders where the platform has concluded a license, **without the creation of any new safe harbours for big platforms.** We continue to believe that this reasonable approach would have broad support, including in the rightholders community<sup>4</sup> and could at the same time conciliate different views of Member States and different political groups in the European Parliament, without the need to give powerful active platforms the gift of a new liability privilege which goes beyond the stated intent of the proposed copyright reform. We also indicated that if, on the contrary, any new safe harbour/"mitigation of liability" would be part of a final trilogue agreement, **we want to be excluded from the entire value gap provision.**

Our concerns were heard at the time on the European Parliament (EP) side and, at the trilogue meeting of Monday 3 December, the EP requested the European Commission (EC) to draft principles for a solution that would, inter alia, **"not put rightholders/the AV sector in a worse position than they are now"**.

Unfortunately to our dismay, the European Commission circulated a [non-paper](#) on 5 December that completely fail to address our legitimate concerns and, instead, states that rightholders, in their

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<sup>1</sup> Case C-527/15 *Stichting Brein v. Filmspeler*; Case C-610/15 *Stichting Brein v. Ziggo BV*

<sup>2</sup> Case C-324/09 *L'Oréal and others* (The CJEU clarified that a platform is not passive and can therefore not benefit from the Article 14 ECD liability privilege when they optimise the presentation and/or promote the content on their platform.)

<sup>3</sup> Case C-682/18 *Google e.a.* The referral took place by a recent decision of 13 September 2018.

<sup>4</sup> The approach was initially welcomed by many right holders, including from the music industry – see Letter of 5 April 2017 "Creative sector calls on European Parliament to solve Value Gap/Transfer of Value in Copyright Directive Report" saying "[The Commission's proposal for a Directive on Copyright in the Digital Single Market provides a meaningful solution to this issue.](#)"

interaction with active platforms like YouTube, have to rely on the mechanisms (notice and action) that were created on the basis of the E-Commerce Directive liability privilege for truly passive intermediaries!

We continue to support the original aims of the proposal, to promote the creative sectors and place simple and clear obligations and rules on platforms. However, if the European Commission is not serious about addressing our legitimate concerns and putting forward a legally sound compromise that respects the EU acquis, **we have no alternative but to re-iterate our demand that is to be excluded from these provisions that would put rightholders in a worse situation than the case is today.**

## Signatories

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