



GSMA-ETNO position paper on the proposed Copyright Directive in the Digital Single Market

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On 14 September 2016, the European Commission presented its reform proposals on copyright and related rights which form a central pillar of the Commission's Digital Single Market (DSM) policy.

GSMA and ETNO member companies are active in various areas relating to the production and distribution of (audio-visual) content, ranging from the acquisition of copyrights, related rights and rights protected in a similar manner than the aforementioned, over the provision of respective (TV and video-on-demand) services to the offering of platforms providing consumers' access to such content services. The inclusion of the latter services into convergent consumer products has continuously gained in importance for member companies, especially given the consumers' increasing demand for propositions, which enable access to – preferably any – content anywhere, at any time, over any device.

The GSMA and ETNO welcome the legislators' endeavour to increase the circulation and availability of works and other protected subject-matter in the Internal Market in the light of growing demand to access content online and via mobile. The GSMA and ETNO suggest that the **EU legislator should provide for additional instruments in this regard while respecting the balance of interests involved.**

In the context of the Copyright Directive, the GSMA and ETNO's key recommendations are as follows:

Extended Collective Licensing (ECL)

- The Council's Working Party on Intellectual Property is currently deliberating inter alia on a presidency proposal relating to "extended collective licensing" (ECL) as a means to render more complete the availability of proportionate, legal mechanisms for the licensing of works.
- Inspired by existing national practices in some EU Member States, the proposal explores whether to foresee (i) that a licensing agreement – concluded by, as one party to it, a collective rights management organization (CMO) acting within the mandate attributed to it and, as the other party, a person intending to exploit a copyright protected work or otherwise protected subject-matter – may extend to apply to the rights of right holders

who have not authorised the organisation to represent them, or (ii) that national law may stipulate that a CMO is presumed to represent right holders who have not authorised the organisation accordingly.

- This proposal for an ECL mechanism at national level addresses a relevant situation; moreover it is specifically targeted towards the very fundament of collective rights management from the perspective of both right holders and users. This would apply to cases “*where obtaining authorisations on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely due to the nature of the use or of the types of works or other subject-matter concerned*”. While otherwise transactions in these areas are unlikely to take place, such approach could help to prevent that revenues for right holders will hardly be generated because no uses occur, and provide full legal certainty for users. In the event of a right holder objecting to the continued licensing of his work or other subject-matter under such scheme, he would be provided with the right to easily and effectively opt out.
- The GSMA and ETNO are not opposed to an approach designed in a generally-applicable manner as an additional instrument for situations in which the greater availability of works and other protected subject-matter through their inclusion into innovative services in the single market is all too often hampered by the impossibility to identify, under meaningful and justifiable conditions, all right holders concerned by the intended exploitation individually. The ensuing lack of legal certainty which collective management societies cannot fully provide for under current conditions – even if they position themselves with the clear conviction that the intended exploitation would be beneficial for its members – in turn means that a serious risk of liability remains for the users willing to explore new territories.
- In any case, the application for an ECL mechanism will be subject to compliance with two conditions which are mainly based in the verifications that there has been both an effective use of those types of works and an effective payment to the holders of those rights by the representatives.

Article 13 (the so-called ‘value gap’ provision)

- The GSMA and ETNO recognise the socio-economic importance of the creative content industries and the principle underlying Article 13 that content rights-holders should receive fair revenue when their works are exploited.
- However, the scope of Article 13 is intended to address those information society service providers (ISS providers) involved actively and directly in the provision of content uploaded by their users to the public. However, for the reasons explained below, of particular concern is that **the scope of Article 13 may unintentionally also cover the activities of internet access providers and cloud storage providers. Express exclusions from scope are required for internet access providers as well as for providers of cloud storage that store user-uploaded content primarily on a ‘closed basis’** (i.e. not generally allowing access by the [general] public).

- **Express clarity is required over the proposed Directive’s relationship to the E-Commerce Directive (ECD)**¹ to avoid creating unnecessary regulatory uncertainty. It should be clarified² that Article 13 complements the safe-harbour provisions under the ECD and is without prejudice to them as far as they apply to those ISS providers falling outside the scope of Article 13. In this regard, it should be confirmed that any obligation under Article 13 should ensure consistency with Article 15(1) ECD and therefore should not entail a general obligation to either monitor information or to actively seek facts or circumstances indicating illegal activity.

Transparency and possible adjustments

- The discussed provisions concern a complex value chain with many actors involved in different ways. In parallel, the amount of works concerned is huge and of different natures. Consequently, if improvements of the current mechanisms related to contract, remuneration and potential dispute resolution had to be made they should be explicit, easy to implement and ensure a real progress in a clear legal framework based on proportionate measures and no further financial and disproportionate administrative burdens. In that respect, the GSMA and ETNO are not convinced by the necessity to introduce the article 14, 15, 16, 16a and is more in favour of having the parties defining themselves the mechanisms.
- However if they had to remain, the GSMA and ETNO would propose the following:
 - **Art 14.1:** it should be clearly stated that authors and performers are in contractual relationship including payment obligations in order to make this provision applicable;
 - **Art 15.1:** it is of utmost importance to introduce in this provision reciprocity in contract adjustment mechanisms and particularly in case of possible unbalanced remunerations, too low or too high, in respect to actual use of works and related revenues;
 - **The provisions of art 14, 15, 16, 16a should apply to contractual relationships established after two years after the expiry of the date of transposition into national law** of the directive in order to give time to the ecosystem to adapt.

Safeguard consumers’ continued access to works

- In the Copyright Directive proposal, legislators have suggested a number of additional limitations and exceptions considered necessary in order to accommodate requirements of society at large; in many instances, the need for such adaptation is identified as arising from changes brought about by digitisation. The **GSMA and ETNO wishes to highlight the need to foster the Digital Single Market also by adjusting, via the Copyright Directive proposal, the provisions on limitations and exceptions** stated in the Information Society Directive (2001/29/EC):

¹ Directive 2000/31/EC of the European Parliament and of the Council

² For example, at recital (4) and Article 1(2).

- The Information Society Directive, as it stands, brings about the risk that – unlike the existing possibility to store content on a physical device present at one’s premises – the same might not be possible in a cloud-based environment. Increasingly, providers of platforms for content are facing legal uncertainty when they wish to offer to users the option of private storage by way of **network-based personal video recorders (netPVR)** as well as users’ subsequent access to those personal recordings online and across borders. This is due to a number of factors, such as (i) lack of mandatory character of the exception, disagreement among jurisdictions on (ii) whether the private copy exemption applies in a cloud-based environment, (iii) which rights have to be regarded in this context, and (iv) what conditions have to be fulfilled when implementation of such functionality is at hand.
- Therefore, the proposed Copyright Directive should explicitly clarify that netPVR is a functionality that does not fall within the scope of the Copyright Directive. This could be done by adding the following (in bold) in the recital 37 after : “Nor should the clarification affect the use of works and other subject matter under an exception or limitation to copyright and related rights, **such as the capacity for a user to make a private copy of a copyrighted work through a network-based personal video recorders operated by a provider of an information society service**”.



About ETNO

ETNO (the European Telecommunications Network Operators' Association - www.etno.eu, @ETNOAssociation) represents Europe’s telecommunications network operators and is the principal policy group for European ecommunications network operators. ETNO’s primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses. ETNO members account for 60% of the total investments in European networks.

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About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with more than 250 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai and the Mobile 360 Series conferences. For more information, please visit the GSMA corporate website at www.gsma.com. Follow the GSMA on Twitter: [@GSMAEurope](https://twitter.com/GSMAEurope).

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