

The Consumer Voice in Europe

EU COPYRIGHT REFORM: PROPOSAL FOR A DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

BEUC demands



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Why it matters to consumers

Current copyright laws fall short of consumers' expectations and needs. Under existing rules, many of consumer's daily and legitimate acts (e.g. producing and sharing content online out of pre-existing works in the form of user-generated content) could be considered as copyright infringements. This copyright reform offers an opportunity to balance the interests of consumers and creators.

Summary

The objective of the proposed Directive on copyright in the Digital Single Market must be to rebalance copyright more fairly for consumers and adapt them to modern uses. BEUC has serious concerns about the content filtering obligation introduced by Article 13 of the European Commission's proposal for a Directive on copyright in the Digital Single Market.

The current proposal fails to provide a balanced copyright system where all different actors involved could benefit from it fairly.

In order to ensure that the current text of the European Commission's proposal introduces sufficient safeguards for consumers, BEUC would like to suggest the following elements:

- The proposed obligation on platforms to take measures to uphold license agreements should be voluntary or it should apply only when the platform is considered to play an editorial role and therefore is considered to be an 'active' service provider when making the users' uploaded content available to the public.
- Copyright exceptions and limitations should be qualified as users' *rights* and therefore become directly enforceable. The introduction of a right of use under existing exception or limitation would guarantee that.
- The clarification that Member States shall ensure that consumers can benefit from judicial redress and access to court in order to uphold their right of use under an existing exception and limitation or any future right to use.
- The introduction of a mandatory user-generated content exception to ensure legal clarity to the current framework.

1. General remarks

Copyright law provides the legal framework for the exploitation of copyrighted works. By means of exclusive rights, authors and rights holders can define who should access the content and under what conditions.

However, the current EU copyright system¹, mainly consisting of exclusive rights of right holders and a list of non-harmonised exceptions and limitations for users, does not recognise the active role of online consumers. For example, it is not clear whether the use of copyrighted materials in the form of user-generated content (e.g. remixes, music used in the background of home video or video mash-ups) are permitted under EU copyright law.

This lack of certainty is well demonstrated in a [survey](#) carried out in 2015 by BEUC and its members. Among other questions, copyright experts from 10 different Member States were asked if it would be legal to use a song in a family home video and share it online. The responses were very diverse and the participants were not able to agree on a common answer.

This survey demonstrates the obvious: if copyright experts do not manage to properly assess if such a basic activity is legal or illegal, how can one expect average consumers to know if their daily and economically non-harmful activities infringe copyright rules or not?

In EU copyright law, consumers are not given rights but the possibility to benefit from certain exceptions to the author's exclusive rights. These exceptions operate as a defence against eventual claims by rights holders and not as enforceable rights. Furthermore, the rules on exceptions and limitations under the current EU directive have not been implemented in a uniform manner across the European Union and while in one Member State it might be legal to make use of a certain exception, that same activity might be illegal in a different Member State.

For all these reasons, the overdue EU copyright reform would have been the perfect opportunity to establish a simple, consumer friendly copyright framework for accessing digital content in the Digital Single Market, while ensuring at the same time appropriate remuneration for creators.

Unfortunately, the European Commission's proposal for a Directive on copyright in the Digital Single Market² does not address these consumer concerns as it fails to provide a balanced copyright system where all different actors involved could benefit from it fairly.

From a consumer perspective, the provision of the proposal addressing the so-called 'value gap' (Article 13) is the most worrisome. A proposal which seems to be inspired by the problems between right holders and one specific platform ignores the role of the different actors involved in the value chain including start-ups, competitors of other platforms and consumers.

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

² Ref.: <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>

2. BEUC's main demands

2.1. Copyright must respect basic principles of EU law and the EU Charter of Fundamental Rights

Article 13 of the proposed directive introduces an obligation on online platforms storing and making available to the public large amounts of content uploaded by users (e.g. YouTube) to take appropriate measures – like content recognition technologies – to uphold agreements concluded with right holders (licenses) and prevent the proliferation of copyright infringements.

From a consumer perspective, this provision carries a number of legal challenges, which we enumerate and comment below:

- First, there seems to be a direct and inevitable conflict between this provision and the liability regime of the e-commerce Directive³: Article 14 of the e-commerce Directive establishes a so-called 'safe harbour' for online platforms which exempts them from being liable for the content they host in their services. By introducing an obligation on online platforms to monitor the content they host, the Commission's proposal seems to contradict the e-commerce directive by creating a new liability regime.
- Second, BEUC is also concerned about the possible incompatibility of this provision with the EU Charter of Fundamental Rights.

The European Court of Justice has already ruled on several occasions⁴ that general monitoring obligations, similar to the one included in the Commission's proposal, are incompatible with Article 8 (Protection of Personal Data) and Article 11 (Freedom of expression and information) of the EU Charter of Fundamental Rights.

Surprisingly, the European Commission acknowledged this in its Impact Assessment⁵ and recognised that freedom of expression might be affected negatively with the introduction of an obligation to filter the online platforms' content.

In order to ensure compliance with the E-Commerce Directive and the Charter of Fundamental Rights, we consider that **the proposed obligation on platforms to take measures to ensure the functioning of license agreements should be voluntary or it should apply only when the platform is considered to play an editorial role and therefore is considered to be an 'active' service provider when making the users' uploaded content available to the public.**

In this context, it is also important to underline that the key distinction between an 'active' and 'passive' platform should be clarified in the context of the E-Commerce Directive (e.g. by means of guidelines) and not in the context of the copyright proposal.

³ [Directive 2000/31/EC](#) of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁴ [Sabam v Netlog](#), C-360/10, ECLI: EU:C:2012:85, Par. 51.

⁵ Commission Staff Working Document - [Impact Assessment on the modernisation of EU copyright rules](#) - Part 1, pages 153 and 154: "The freedom of expression and information **may be affected negatively** in cases where the services limit user uploaded content in an unjustified manner (for example when an exception or a limitation to copyright applies or the content is in public domain) or when the technologies fail to identify the content correctly. This negative impact **should** be mitigated by the fact that the services would be obliged to put in place the necessary **procedural safeguards** for the users which in the majority of cases **already exist** in the related context of notice and take down requests."

2.2. Consumers should have rights under copyright law

The exceptions and limitations such as the private copying or the quotation exceptions provided by the current Copyright Directive are often undermined because companies apply technical protection measures and contractual agreements, in the form of end-user licence agreements.

Because the exceptions are not considered as users' rights, they cannot be enforced by users against contractual and technological restrictions affecting the exercise of those authorised uses. This became a prominent problem in national jurisprudence. For example, in France and Belgium, consumers were denied the possibility to make private copies of a DVD (despite the fact of private copying being an exception under French and Belgian laws) because the courts estimated that an exception is not a right but a defence and therefore a user cannot ask for its application when it has been limited by a technical protection measure (See: "*Mulholland drive*" case⁶).

BEUC asks for copyright exceptions and limitations to be qualified as users' rights and therefore become directly enforceable. The introduction of a right of use under existing exception or limitation would guarantee that. This is the approach suggested by the draft report of the Legal Affairs (JURI)⁷ and the opinion report of the Internal Market and Consumer Protection (IMCO) committee⁸.

2.3. Consumers should be given the possibility to benefit from judicial redress

BEUC considers that the safeguard and redress mechanisms proposed by the European Commission in Article 13(2) are inadequate to ensure the protection of consumers' fundamental rights. This was even recognised by the Commission's own impact assessment, which assumed that any negative effect by these measures on fundamental rights would be mitigated by a redress mechanism.

However, the current text of the Commission's proposal is far from sufficiently safeguarding such rights. This is because the proposed mechanisms are based on the terms & conditions and algorithms of each service provider. This means that it is up to the private companies to unilaterally establish what an infringement is and to deal with consumers' complaints within the conditions of their own terms of service and not according to the rule of law.

Therefore, we ask for a **clarification that Member States shall ensure that consumers can benefit from judicial redress and access to court in order to uphold their right of use under an existing exception and limitation or any future right to use.**

⁶ Ref.: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/05_16.002_8777.html

⁷ Ref. to JURI draft report: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-601.094%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>

⁸ Ref. to IMCO Opinion: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-599.682%2b02%2bDOC%2bPDF%2bV0%2f%2fEN>

2.4. Consumers should benefit from a user-generated content exception to create and share content online out of pre-existing works

Finally, BEUC strongly supports the introduction of a **mandatory user-generated content exception to ensure legal clarity to the current framework.**

As mentioned above, consumers are increasingly producing and sharing content online out of pre-existing works in the form of videos or audio recordings (e.g. remix song, mash-up video, etc.). However, under the current copyright system, it is not clear whether such content constitutes a copyright infringement.

The introduction of a user-generated content exception, in full compliance with the 'three-step test'⁹, would enable consumers to lawfully share their own generated content. This is the position adopted by the Internal Market and Consumer Protection (IMCO)¹⁰.

⁹ The 'three-step test' was established in Article 9 (2) of the [Berne Convention](#) for the Protection of Literary and Artistic Works. It states that "*It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*"

¹⁰ Cfr. footnote 8



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