

Closing the Value Gap: The Liability of Online Platforms

Briefing paper

One of the biggest – if not the biggest – source of content when it comes to music today are online platforms such as YouTube, Facebook and TuneIn. Music and other user-uploaded content (UUC) is vital to YouTube's success and advertising revenues and actually accounts for 40% of its views¹. Moreover, although total market value of YouTube for instance is estimated to be over EUR 70bn and the platform has over 1bn unique users accessing the platform each month, the authors behind the content are currently not being remunerated, or poorly so. Numbers show that out of the USD 70bn generated by YouTube, authors receive a share of EUR 0.0007 per stream. This issue is often referred to as 'the value gap'.

The main issues related to the value gap are two-folded:

1. Authors are not/or poorly remunerated for the content uploaded on online platforms
2. It creates a disadvantage to content providers who get access to works through licensing agreements with rightholders

For the Digital Single Market to work as a *digital* and *single* market, it is crucial to ensure fair remuneration for authors and a fair level playing field for licensed digital content providers who have based their business models on licensing agreements with the right holders. ECSA therefore welcomed the European Commission's proposal on a directive for copyright in the Digital Single Market, published on 14 September 2016.

The Commission clarifies in Article 13 and recital 38 existing rules laid down in the Infosoc Directive of 2001 and the e-Commerce Directive regarding the liability of online platforms that are making available user-uploaded content (UUC). According to the proposed text, online platforms that actively communicate content to the public cannot hide behind safe harbour provisions set out in the e-Commerce Directive. So whilst online platforms have been arguing that they are merely "technical intermediaries", the Commission laid down that these platforms in fact communicate content to the public by making it available on their platforms. Some figures show that as much as 80% of the watch time on YouTube is on content suggested by the platform itself.

Whilst ECSA was pleased to see the clarification in recital 38 paragraph 1, stating that by "going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders", ECSA believes this should be reflected in a separate article or as an addition to Article 13.

The same can be said for the additional specification done by the Commission in recital 38 paragraph 2 which states that it has to be taken into consideration whether the service provider (online platform) plays an *active role* vs. a passive role by for example optimising the presentation of the uploaded works or

¹ PHOENIX CENTER POLICY BULLETIN NO. 41, T.Randolph Beard, PhD, George S Ford, PhD, Michael Stern, PhD, March 2017 <http://www.phoenix-center.org/PolicyBulletin/PCPB41Final.pdf>

promoting them, actions often conducted by platforms such as YouTube. The specification underlines further that online platforms should be held liable for the actions made on a daily basis to promote the uploaded content. However, if the online platform has a passive role (for example Facebook) but *provides a large amount of content*, the platform will have an obligation to cooperate and use technical tools to ensure cooperation with rightholders. As a result, the online platforms that go under the ‘safe harbour’ provision are platforms which communicate to the public but have a passive role in doing so and only provide a small amount of content.

Online platforms often argue that an obligation to have effective content recognition tools will harm SMEs and other start-ups due to the millions of euros they will have to spend on setting up such tools. However, the truth is that technical solutions for licensing and protection purposes already exist and these services can be provided for approximately € 500. For instance, services such as Audible Magic and Dubset are able to both identify UUC and manage the relevant data.

Another argument often heard is that by setting up content recognition tools and ‘user monitoring’, the European Commission’s proposal is putting freedom of expression in danger. In this regard, it is important to underline that the incorporation of such a provision into the directive will not harm user privacy because a content recognition system as set forth in Article 13 only concerns content, not user data and the identity of the person communicating the content. In other words, personal data and user privacy would not be affected.

As amendments are currently being discussed and are soon to be voted on in the European Parliament, ECSA welcomes several of the amendments tabled by the different committees of the European Parliament working on the copyright file. Many of the amendments show that the Parliament, although subject to internal discussions and disagreement on the issue, are riding a somewhat positive wave when it comes to value gap and that several MEPs are siding with authors.

As an example, AM 814 on Article 13 paragraph 1 in the JURI amendments, tabled by MEP Niebler (EPP), MEP Ehler (EPP) and MEP Voss (EPP) help to clarify which online platforms can benefit from the safe harbour provision of the e-Commerce Directive and which platforms clearly should not benefit from such an exception.

ECSA believes that a similar wording in the final directive will benefit:

- **Creators** – it will make sure that they can fairly license their music repertoire and be remunerated for the use of their works on online platforms. It will also have a positive impact on creators’ moral rights as Content ID will have to be improved to make sure that the correct data appears when content is being watched (name of creator etc.)
- **Consumers** – they will benefit from more legal certainty and more [qualitative] cultural content as a result of a fairer online market

Digital service providers – it will create a level playing field which will provide fair competition in the Digital Single Market

ECSA therefore calls upon the European Parliament to support the European Commission’s proposal in the interest of creators across Europe. Attached to this briefing you will also find a letter written by GESAC, with the support of ECSA, urging the European Parliament to properly address the issue of the value gap.