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To Whom It May Concern:

Creative Commons has been following with interest and concern the proposed changes to EU copyright law, most recently the publication of the Commission's proposal for the Directive on copyright in the Digital Single Market.

Creative Commons (CC) is a nonprofit organization that provides free, open copyright licenses and other legal tools to promote creativity and sharing. CC is represented by an international network of affiliates in over 85 countries, including 27 of the EU Member States.

The Creative Commons licenses facilitate novel social, educational, technological, and business practices. We support productive relationships around networked knowledge and culture. Our licenses will always provide voluntary options for creators who wish to share their creative works on more open terms than current copyright systems allow. But the CC vision — universal access to research and education and full participation in culture — will not be realized through licensing alone. That is why we believe that to ensure the maximum benefits to both culture and the economy in this digital age, the scope and shape of copyright law need to be reviewed.

As introduced, the Commission's proposal fails to deliver on the promise for a modern copyright law in Europe. The Directive should have provided for progressive policy changes to serve the goals of a unified digital marketplace across Europe. It should have jumpstarted economic activity, championed innovative digital technologies and services, and protected consumers and access to information. It should have expanded opportunities for European businesses, cultural heritage institutions, educators, and the research community.

Now is the time to consider productive changes that will benefit all creators, users, educators, and innovators. We are asking for a copyright system that will be fit for the digital age and flexible enough to adjust to the quickly changing environment.

Ancillary Copyright

The Commission proposes to introduce an ancillary copyright (aka "link tax") for press publishers to extract fees from search engines for incorporating short snippets of—or even linking to—their content. Previous experiments with ancillary copyright in Spain and Germany have not worked, as confirmed by the Commission in its impact assessment and

by some Spanish press publishers in their comments during the consultation. Implementing such a right at the EU level would have a strong negative impact on all stakeholders, including publishers, authors, journalists, researchers, online service providers, and users. The Ancillary Copyright provision would also undermine the intention of authors who wish to share without additional strings attached, including under Creative Commons licenses.

This provision should be removed from the Directive.

Education Exception

The Commission proposes to introduce an exception to use copyrighted works in digital and cross-border teaching activities. The proposal is disappointing because it would permit Member States to disregard the exception if education materials are available through a licensing option. In addition, the exception would only benefit formal educational establishments, and only cover the sharing of copyright-protected works within closed online networks (such as a school's learning management system).

The exception should be amended to allow anyone in the service of teaching and learning to use and share content online for educational purposes in accordance with fair practice, without the additional burden of having to determine whether there is a licensing option available. Even better would be to harmonise the InfoSoc's technology-neutral teaching exception across the EU.

Text and Data Mining Exception

The Commission proposes to introduce an exception for text and data mining (TDM). The exception would be available only to non-profit research organisations. This will restrict the potential for TDM discoveries because it specifically excludes the private sector. All uses that do not fall under this limited exception will need to be licensed. This will create a situation where text and data mining outside of the academic sector would be limited to data sources that are available for licensing. In addition, the proposal limits the scope of the TDM activity to only scientific research purposes. This constraint would decrease the potential impact of novel TDM uses, such as for journalism-related investigations, market research, or other types of activities not strictly considered scientific research. A positive aspect of the exception is that it cannot be overridden by contract, even though it would have been better to also forbid the use of technological protection measures to restrict access and use of the underlying works for purposes of TDM.

The TDM exception should be amended to allow anyone to undertake text and data mining of all lawfully accessible materials for any purpose.

Use of out-of-commerce Works by Cultural Heritage Institutions

The Commission proposal also addresses the difficulties that cultural heritage institutions face when trying to make out-of-commerce works contained in their collections available

online. The Commission's proposal would require member states to pass legislation that facilitates extended collective licensing of such works. Under such a system collecting societies could also grant licenses to cultural heritage institutions for the use of works by rightsholders who are not represented by them. While such a system would make it easier for cultural heritage institutions to make available some type of works, it will not work for all types of out-of-commerce works. As a result, the proposed licensing solutions alone will not accomplish what is needed to enable online access to Europe's rich cultural heritage.

A better solution would be to introduce an exception for the use of out-of-commerce works, which would work alongside the few, well-functioning licensing or collective management solutions in use today.

User-generated Content Filtering on Internet Platforms

The Commission proposes to introduce a requirement for internet platforms to monitor and filter user uploads by working with rightholders and implementing content recognition technologies on their systems. Such a requirement extends above and beyond the typical responsibilities of intermediaries, and could have negative, lasting effects on nonprofit, commons-based platforms (such as Wikimedia), which have traditionally been exempted from such onerous requirements. Furthermore, the proposal would severely limit the ability of citizens to communicate via commercial platforms, which will now be incentivised to filter the free expression of their users. In addition, the proposal is in conflict with Article 15 of the E-Commerce Directive, which prohibits general monitoring obligations for internet platforms.

This provision should be removed from the Directive.

Freedom of Panorama

In several Member States citizens do not enjoy the basic right to create and share images of buildings, art, and other works permanently located in a public space. The Commission's proposal does not introduce a harmonised exception for this activity.

We support the inclusion of a mandatory exception guaranteeing Freedom of Panorama, covering both commercial and noncommercial uses, as well as online and offline uses.

General exception

The current proposal lacks a general exception that can apply to specific cases not envisioned in the legislation. Modern copyright laws should be adaptable to new uses and technologies over time without the need for legislative modification. The key to enabling this attribute is the inclusion of a general exception that is open to a potential use for any purpose based on application of a flexible balancing test that complies with the international three-step test in Berne Convention Article 9. Models for such an exception include the U.S. Fair Use clause as well as Article 5.5 of the WITTEM European Copyright Code.

The Commission proposal does not take into account most of the feedback from the wide array of voices requesting a modern copyright law fit for the digital age and marketplace. We hope that through the national consultations and the forthcoming legislative proceedings in the European Parliament and the Council of the European Union, the Commission's proposal can be modified to include positive changes that will support all stakeholders, including creators, users, and the public interest.

We are available to provide input during the consultation process, or answer any questions you may have.

Sincerely,

Creative Commons
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Asociación Civil Tejiendo Redes para el Desarrollo Integral de las Comunidades (Peru)
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