

ETNO and GSMA joint position paper on Article 13 of the proposed Directive on Copyright in the Digital Single Market (The 'Value Gap' proposal)

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The Commission's objective in **Article 13 (the so-called 'value gap' provision)** is to improve copyright protection through the promotion of the level playing field between content rights-holders and certain types of online music/audio-visual sharing service providers. As such, Article 13 is intended to represent a highly focussed sector-specific approach to address a specific situation in which a 'value gap' is perceived.

ETNO and GSMA recognise the socio-economic importance of the creative content industries and in the principle underlying Article 13 that content rights-holders should receive fair revenue when their works are exploited. However, to the extent that the 'value gap' can be addressed by a proportionate legislative intervention, ETNO and GSMA wish to highlight the following issues for urgent consideration during the legislative passage of Article 13 and its accompanying recitals:

1. **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).
2. 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. Also 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.

Unclear scope of Article 13

The scope of Article 13 is defined by reference to an ISS provider that stores and provides access to the public of "*large amounts*" of copyright-protected works that are uploaded by its users. In addition to the ambiguity of the notion "*large amounts of works*", for which a clarification is needed, this provision creates legal uncertainty on whether an **internet access provider** is caught within the scope of Article 13 for the following reasons:

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

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

- An internet access provider uses caching technology to deliver content to its users more efficiently. Caching involves making automatic and temporary copies of customer content that passes through its network in order to provide its internet services more efficiently.
- The content that is cached (stored) by the internet access provider could, in principle, contain copyright-protected works uploaded by its users.

Therefore, internet access providers might be considered as storing and giving access to content to the public and risk being caught within the scope of Article 13. However, to the extent that ISS providers are using caching technologies, there is no justification for them to be included within the scope of this sector-specific legislative intervention addressing the so-called 'value gap'. Therefore, they should be explicitly excluded from the scope of Article 13.

It is unclear whether **cloud storage providers** are caught by Article 13. An express exclusion is required for this category of ISS provider which takes the following into account:

- It is commonplace for cloud service providers, whose services are primarily intended and used by end-users for individual private and/or business use, to provide their users with the function to share uploaded content with a limited range of other persons, such as colleagues, family and friends (thus in a non-public setting).

Therefore, a qualifier is required so that the exclusion applies to cloud storage providers whose services are used primarily on a closed-basis (i.e. not generally for public access).

Overall, it is critical that the **scope of Article 13 continues to require a cumulative requirement** that it applies to ISS providers which store user-uploaded works *and* provide access to the public to such works. Any ambiguity that Article 13 could be engaged solely by providing access to user-uploaded works creates unnecessary legal uncertainty and could lead to excessively extending its scope of application without any justification having been provided or being identifiable in this respect.



About ETNO

ETNO (the European Telecommunications Network Operators' Association) 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.

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