



Brussels, 23 April 2018

Re: Creativity Works! urges policymakers to support future proof solutions in negotiations on DCD

Dear XX,

As trilogue negotiations on the Directive for Digital Content (DCD) continue, Creativity Works, a leading European coalition of the cultural and creative sectors, would like to express our support to the Parliament, Council and Commission for the progress made on this draft Directive aiming to strike a fair balance between the interests of consumers who receive digital products and the interests of businesses who provide them.

We understand that only a few issues remain to be settled and once again urge negotiators to take into consideration the implications of the Directive for Europe's cultural and creative sectors:

- **Embedded digital content** should not be included in the proposal at this late stage. It would have far-reaching consequences for both suppliers and consumers. The impact of extending the scope of the draft Directive to this area is unclear as it has not been properly assessed. Moreover it could lead to a great deal of confusion when determining the liability of producers of goods or suppliers of content. We believe that consumers should, however, receive "digital" rights for digital content supplied on a tangible medium, as this is fair and not difficult to implement in practice.
- On **long-term contracts**, we urge lawmakers to support the Parliament's Amendment 115 to Article 16.1.a, which provides: *"Where the consumer terminates a fixed term contract and the contract duration or any combination of renewal periods exceeds 12 months, the trader shall be entitled to proportionate compensation for those advantages he has given to the consumer because of the contract duration exceeding 12 months."* This should not be restricted to long-term contracts where tangible goods are made available.

Many creative businesses do not provide any equipment or almost exclusively rent equipment to their customers (such as for example a decoder) because it cannot be used and has no practical value outside of a subscription. A harmonised approach on these issues would provide us with much needed clarity and legal certainty that would not lead to a patchwork of interpretations.

However, if clarity cannot be achieved in negotiations, then it would be best if these issues are left to Member States. Businesses in the creative industries need flexibility and certainty in order to make large, and often risky investments in high quality content. In exchange, consumers get more choice, free services offered and significant reductions in monthly fees. The model is a win-win for consumers, business and cultural diversity. We want to be able to continue to offer long-term value to consumers, but if the rules in the Directive *de facto* prohibit this, everyone will lose.

- It is essential that the **DCD does not interfere with international and EU copyright law** as suggested by Recital 21 of the Commission proposal as well as the provisional agreement negotiators have reached on Article 3, paragraph 8a. The Parliament's position in Recital 26 would

contradict this essential principle and would introduce further wording on copyright exceptions which is unnecessary and only causes confusion.

Originally, **the purpose of Recital 26 set out to address interoperability as part of objective conformity criteria**. However, the Parliament's proposed Recital 26 (as adopted by the JURI & IMCO committees on 21st November) would unduly expand the scope of the Directive with a provision to include copyright-protected works. This clearly interferes with the 2001 Copyright Directive as it stipulates that *"Contractual clauses that specifically prevent the lawful enjoyment of exceptions or limitations laid down in copyright law constitute a lack of conformity."*

The proposed wording in Recital 26 would unduly interfere with the prerogatives of existing EU Copyright law and be incompatible with international norms. In particular, it would unduly interfere with the relationship between technological measures and exceptions which is governed by Article 6 of the Directive 2001/29/EC. It would also go against the principle that an exception is not a right, but a defence to what otherwise would be a copyright infringement. As a general matter, contractual override is permitted under EU law and in any event should be dealt with exclusively in the context of Copyright legislation and not consumer protection law.

- After a long debate in both the European Parliament and the Council, a carefully balanced approach has been reached on the **role of data**, which takes into account the interests of both business and consumers. CW! urges policymakers not to introduce any new concepts at such an advanced stage of the process.
- We support the Council's approach on the **Burden of Proof provisions**. Businesses should bear the burden of proof to demonstrate conformity for one year only.

We thank you for considering these important concerns. Should you have any questions or comments, we remain at your disposal.

Sincerely,
Creativity Works!

About Creativity Works!

Like-minded organisations, federations and associations from the European cultural and creative sectors have formed a coalition: Creativity Works!. Its objective is to foster an open and informed dialogue with EU policy-makers about the economic and cultural contribution made by creators and the cultural and creative sectors in the digital age. Members are brought together by a sincere belief in creativity, creative content, cultural diversity and freedom of expression.