

## **Article 13 Mythbuster**

### **What is Article 13 about and what does it mean?**

Article 13 is part of the proposed new Copyright Directive which is being considered by the European institutions. The proposed Article 13 is intended to require platforms that host creative works uploaded by their users to fairly share the income they generate with creators. This is achieved by ensuring these content-sharing platforms have the same liability for copyright as other online services.

It is important to note, however, there is not just one Article 13. Due to the process by which EU law is agreed, there are currently three proposed texts. These have been agreed separately by the EU Commission, the EU Council and the EU Parliament. While each text sets out to achieve the same objective – a fairer share of revenues and a more efficient online market – there are some very different approaches and, consequently, potentially differing impacts.

### **What is all the fuss surrounding Article 13?**

After two years of extensive discussions and detailed examination of, Article 13, the legislative process is now in its final phase. A final text, which will be the result of negotiation and compromise between the three existing proposals, must be agreed and approved before the end of March 2019. So, all those affected by the proposals are battling to win political and public support for their respective positions.

### **YouTube claims it backs the principle of fairly paying, so why are they against Article 13?**

YouTube and similar services have stated they agree with the principle of fairly paying creators and argue they already pay significant amounts to rightsholders.

However, they do not agree with the music industry and other creative sectors what constitutes “fair” and, crucially, how that fairness should be determined.

The creative industries believe the only way to ensure fairness is to clarify that online platforms which host works uploaded by users are liable for the copyright acts of those works on their site. Only then can creators and platforms negotiate on a level playing field and only then can value be determined by the principle of ‘willing buyer, willing seller’ (i.e. a price at which the seller is willing to sell) and the buyer is willing to pay.

In absence of this clarity and equality, the seller (i.e. the rightsholders) are forced to accept only the value the buyer, the platform, wants to pay. This is the case today and will remain so without a meaningful Article 13.

All three of the Article 13 texts clarify that platforms which host works uploaded by users are liable for copyright.

**What about the claim that if services are made liable for the works on their site, they will be forced to block most uploads? What about the claims that will “kill the internet”?**

This is simply not true. Some online services do argue that if made liable for copyright they will be forced to block most uploads as it will be impossible for them to identify all the rightsholders and secure the necessary licences. There are claims that if they did not block these works, they would be exposed to multi-million-pound claims for damages. For example, YouTube has suggested an alleged incomplete share of the musical works on the

track Despacito would have forced them to block the work on upload.

There are several reasons this argument falls apart under scrutiny, not least because Article 13, in any of the three existing guises, will not create problems to which there are not already solutions.

All online music services operate with some uncertainty of rights ownership. For example, the attribution of the rights in a musical work is generally made after the sound recording has been released.

Online services, including YouTube, mitigate any risks posed by unattributed rights in musical works through their blanket licences with collecting societies and publishers, through which they are then licensed for all the repertoire owned or controlled by the licensee, even whereby the rights have not yet been attributed.

Even in the minority of cases where the rightsholders cannot be identified or individual works are not covered by blanket licences, online services aren't liable for multi-million-pound damages claims.

Under European law, damages must be “effective, proportionate and dissuasive” and are limited to what is “fair and equitable”. It is an accepted assumption in European law that damages cannot be punitive, unlike in the US where infringement cases often seek millions in punitive damages.

Therefore, platforms can, and currently do, hold back the proportion of royalties that would be due to unidentified rightsholders until a claim is made. So, if YouTube did choose to block works, it would be a purely business

decision to change their existing operations and not a result of Article 13.

Finally, it should be stressed that the various versions of Article 13 address the issue of operating without full authorisation or a licence. The Council proposes a limitation from liability for platforms in cases where authorisation has not been granted but the platform has used its best efforts to prevent the availability of works notified to them by rightsholders. Parliament requires co-operation between rightsholders and platforms to prevent the availability of unauthorised works.

We also note that YouTube has not substantiated its claims in respect of Despacito and the evidence suggests that the publishing rights were not incomplete for the original works or various versions of it.

**Some are claiming Article 13 will only benefit big businesses like record labels. Who will Article 13 really benefit?**

Article 13 has received support from across the music industry, representative bodies, collecting societies, writers, performers and publishers alike. That speaks for itself, against an accusation that only one part of the sector will benefit.

Article 13 should also be read alongside Articles 14 to 16: these latter Articles will provide authors and performers with additional rights to obtain more information on the use and value of works and to re-negotiate contracts where the initial remuneration is disproportionately low compared to the value subsequently generated.

When taken together Articles 13 to 16, authors and performers stand to benefit significantly from the proposed Copyright Directive.

**YouTube says there is a better way. What is this better way?**

Recently, YouTube have stated that there is a better way forward with Article 13, however they have yet to come forward with any proposal of what this better way could be. Their public engagement with the proposal for a copyright directive has been limited to just stating what they claim are problems and not what they believe are realistic solutions.