

**Article 13: Erosion of intermediary liability protections - introduction of general monitoring obligations for internet intermediaries**

The Commission's stated goal is to enable rightholders (in this case, a small number of mainly US and UK record labels) to negotiate more lucrative commercial deals with a handful of internet platforms that enable users to upload audio and video content. These platforms are used actively by record labels, professional artists and creators as a uniquely cost-effective way to advertise their content to global audiences. These services are not primarily intended for promotion of such commercial content, but are used by millions of people worldwide to share a wide range of non-commercial, user-generated content and serve instructional, educational, and many other purposes. As such, they perform important functions for knowledge-sharing, access to information, and free expression.

Record labels argue that these platforms should share more revenues generated from online advertising – the so-called '[value gap](#).' Article 13 and the associated recitals are intended to give record labels better leverage in negotiations. Sharing of revenue between a small set of global companies is essentially a commercial issue and should not be used to justify broad legislation that impacts the internet in its entirety, with severe consequences for citizens' rights to free expression and access to information. As a general matter, if the Commission considers that certain market practices violate competition rules, it is important to remember that it has competition law instruments at its disposal. Alternatively, if the Commission believes that the rules governing the responsibilities of internet intermediaries require updating, it should review the Electronic Commerce Directive and/or the notice-and-action processes in place in different Member States.

As a general observation, CDT acknowledges that authors and creators should obtain fair remuneration and benefit from dissemination of their works. It would no doubt be desirable to increase the revenues and royalties creators and artists collect from record labels, collective management societies, and other organisations. Legislators should find ways to enhance the position of creators and artists in the value chain by strengthening Articles 14-16 of the proposal.

Article 13, Recitals 38 and 39 together have the following harmful and disproportionate consequences. First, the text states that service providers that host third-party content are also publishers of that content. Second, it narrows the intermediary category covered by ECD Article 14 by excluding intermediaries that optimise or promote user-generated content. Third, it imposes what amounts to a general monitoring obligation on intermediaries of any kind to employ technological measures to monitor and filter uploaded content. The text undermines and erodes intermediary liability protection, not only for the handful of platforms at which it is targeted, but potentially any website that hosts any kind of user-generated content. The text is in clear conflict with the ECD, and would, if adopted, cause serious limitations to fundamental rights to free expression and access to information and impede innovation and business development by internet start-ups.

**In summary, CDT recommends the deletion of Article 13 and Recitals 38 and 39. The Copyright DSM Directive is not the appropriate instrument to address the challenges presented by the Commission. Alternatively, the Commission should redraft the text to bring it in line with the ECD and narrow its scope very significantly.**

**Article 11: an “Ancillary Copyright” for Publishers - a solution that has failed its objective**

The Commission's stated objective is to enable news publishers to develop new revenue streams. The context is the shift from print to digital in the publishing industry and the shift in the market for advertising. Parts of the publishing industry have had difficulty adjusting their business models to the digital environment and making use of the new opportunities it affords. The Commission wishes to ensure the sustainability of the publishing sector in the face of these challenges. The Commission believes that an ancillary right for publishers will increase their legal certainty and ability to receive compensation for online use of their publications and have a positive impact on their ability to license content and enforce the rights on their press publications.

The Commission is right to point out the need for a free and pluralist press to ensure the proper functioning of democratic societies. Ensuring and maintaining a sustainable free press in the digital environment is a broad societal concern. A number of factors are important in achieving this goal, but there is no evidence that the Commission's proposal for a publishers' right would contribute to it.

Fundamentally, it seems hard to justify that it is difficult for publishers to control and license their works online. In fact, publishers use a number of tools to manage and control access to articles and other content. Publishers use full or partial [paywalls](#) and make some content available based on advertising, while reserving other content for subscribers. They use [standard protocols](#) to either allow their content to appear or prevent it from appearing on news aggregation sites and in search results. Further, many publishers make full use of [different digital channels](#) to engage with their audience. Whereas in the past a subscription would usually be restricted to one print copy, today's digital environment enables publishers to offer subscribers access on computers, tablets, and smartphones and to augment their content with podcasts and audio versions. This maximises the utility of the content for the user and hence the price she is willing to pay. Finally, innovative European services like [Blendle](#) develop new ways for publishers to monetise their content. This sort of innovation and business model development can help quality news organisations thrive in the digital environment.

The challenges facing the news sector in the digital environment are [well-documented](#). Not all publishers are successful in meeting these challenges, and it is an important societal priority to help ensure a well-functioning news sector. But a new right for publishers is unlikely to contribute to this goal. Rather, [experiences in Germany and Spain](#) suggest the opposite and demonstrate that introducing this right has had unintended consequences, both for news outlets and free expression and for access to information. Indeed, the European Commission freely admits that it does not know what, if any, new revenues a publisher's right would generate and that it has no clear idea about how the right would be used.

**In summary, for these reasons, Article 11 and the associated recitals should be removed from the proposed Directive. A new publishers' right will not help address the Commission's concern: ensuring a sustainable free press. There are a number of other initiatives the Commission and Member States can and do take to achieve this, but they do not belong in the DSM Copyright Directive.**

**Article 3: A Much Too Narrow Text and Data Mining (TDM) exception**

Text and Data Mining (TDM) is defined in the Commission's proposal as "*any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations*" [Article 2(2)]. The exception provided in Article 3 is mandatory, universal, and not limited to non-commercial activities. CDT welcomes that the exception is mandatory, as opposed to the approach based on voluntary exceptions of the current copyright framework, which results in a patchwork of implementations in EU Member States and legal uncertainty in an online or cross-border environment. We also welcome its universality; as Article 3(2) stresses, contractual bypasses are not allowed. Such a principle should be applied to all the existing exceptions, as it is difficult to understand why all the legislative work can eventually be brushed aside by one obscure contractual clause that the parties at the table without copyright often cannot negotiate. Lastly, CDT welcomes that the exception is not limited to non-commercial activities. This is important because research activities, even within institutions such as universities, are often conducted through public-private partnerships or with some form of private funding, rendering any restriction to non-commercial activities unworkable in practice.

However, we also find some shortcomings in the European Commission's proposal. First, Article 3(1) and Recital 11 stress that the beneficiaries of the TDM exception are limited to 'research organisations.' This scope is too limited and thus detrimental as it excludes not only innovative businesses such as start-ups from benefiting from this exception, but also individual researchers without an organisational affiliation from working in an independent manner, such as investigative and citizen journalism, if they need to use TDM with legal certainty.

Second, Article 3(3) and Recital 12 narrow the purpose of the TDM exception far too much. The proposed draft only covers 'scientific research' and for no obvious reason excludes many innovative uses of TDM that bring benefits to our society.

Finally, and the most worrying, Article 3(3) and Recital 12 give rightholders the possibility to neutralise the exception in practice through so-called security and integrity measures. This could create a loophole for abuses by allowing publishers to introduce random measures to protect the 'security and integrity' of their network that could make the effective use of TDM impossible. Alternatively, the use of the publishers' own platforms could become the only viable option for researchers. This loophole could allow rightholders to arbitrarily block access for researchers trying to conduct TDM. Safeguards in line with those established in the context of 'traffic management' under the Telecoms Single Market Regulation, i.e. with requirements of proportionality, efficiency, and non-discrimination, could be a good starting point to frame this measure.

**Proposed amendments:**

Commission proposal	Proposed amendment	Justification
<p>1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions <b>made by research organisations</b> in order to carry out text and data mining of works or other subject matter to which they have lawful access <b>for the purposes of scientific research.</b></p> <p>2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.</p> <p>3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. <b>Such measures shall not go beyond what is necessary to achieve that objective.</b></p> <p>4. Member States shall encourage rightholders and <b>research organisations</b> to define commonly-agreed best practices concerning <b>the application of the measures referred to in paragraph 3.</b></p>	<p>1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, <b>Article 4(1) of Directive 2009/24/EC</b> and Article 11(1) of this Directive for reproductions and extractions in order to carry out text and data mining of subject-matter to which persons have lawful access.</p> <p>2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.</p> <p>3. Rightholders shall <b>not</b> be allowed to apply <b>technological measures to prevent or hinder beneficiaries from benefiting from the exception provided for in paragraph 1, unless</b> to ensure the security of the networks and databases where the works or other subject-matter are hosted.</p> <p>4. Member States shall encourage rightholders and <b>beneficiaries</b> to define commonly-agreed best practices concerning <b>responsible text and data mining protocols with the intention for such best practice text and data mining protocols to be harmonised union-wide.</b></p>	<p>CDT believes the TDM exception under Article 3 of the Commission proposal should be amended to expand the scope and scale of the beneficiaries, who should be both natural persons and legal persons, and should not be limited to research organisations. The exception should also not limit the purpose to scientific research, nor the scope of the minable materials. Finally, Article 3 should ensure that any security or integrity measures implemented by rightholders are open to rigorous scrutiny and must abide by a set of parameters that prevent abuse.</p>