

BAPLA response to the proposed EU UGC Exception

About BAPLA

BAPLA, founded in 1975, is the UK trade association for picture libraries and agencies representing members of a unique area of the creative industry. BAPLA has a broad and diverse membership of image-makers and purveyors, from sole traders to major news, stock and production agencies, as well as SMEs, archives and cultural heritage institutions. BAPLA members are the main source of licensed images you see every day in print and digital media.

Our members generate revenue for, and manage the interests of over 120,000 creators and rights holders, encompassing a breadth of experienced and new young image-makers. The photo library and agency sector is unique within the framework of the image industry as it is a vital economic link for many professional image-makers, and as such has always embraced new technologies into working practices where possible. Our industry specialises in recognising the marketplace value of images and for decades has supported the ability of professional image-makers to derive income and reinvest in their creativity.

A UGC Exception

BAPLA welcomes the efforts of the European Parliament to introduce a Copyright Directive, which proposes fair and balanced regulations with consideration for the millions of creative rights holders represented across Europe. However we felt compelled to specifically respond to the User Generated Content exception (UGC) proposed by both CULT and IMCO committees.

Introducing an exception without proper consideration for the unintended consequences we believe will have dire results on the visual sector, tipping the balance so far in favour of online tech corporations that it could irreparably change the ability of visual rights holders to fundamentally exploit their own works in a manner of their own choosing.

Over the years as more content is uploaded and shared online, Internet Service Providers (ISPs) and Social Media Platforms (SMPs) have done very little to take responsibility for identifying the difference between original UGC and 'commercial licensed content' uploaded without permission and labelled as UGC to support enforcement and fair remuneration. Recently however, much emphasis has been placed on the lack of responsibility by ISPs & SMPs on tackling advertising placed next to 'fake news' and 'hate speech' content, whereby certain ISPs & SMPs have been heavily criticised for having far more interest in income generation¹.

The current impact of sharing both non-permitted (i.e. infringed) and permitted images on SMP sites and via ISP 'Images' sections is significant and damages the professional capacity of the image sector in three particular ways:

- Framing images, which discourages or disconnects the image from a rights holders' source;
- Hosting defence, which enables ISP & social media sites to stand at arms length to unconstrained and relentless infringement;
- Implied licence, which enables wholesale exploitation, as there is no transparency or ability to negotiate.

There are also specifically two different issues for the images industry in relation to content uploaded unchecked:

¹ <http://www.bbc.co.uk/news/technology-39360431>

- For the professional individual or organisation (who have little choice but to use these popular platforms to attract new business), there is no opportunity to negotiate a fair contract and as a result unreservedly gives SMPs and ISPs rights to exploit in perpetuity;
- For images uploaded by others without the permission of the rights holder, not only infringes copyright but as consequence enables third party uses and advertising in perpetuity, again without any remuneration for the rights holder.

Infringing is further exacerbated by sharing mechanisms promoted on such sites, for example images are subsequently used to illustrate blogs embedded within commercial websites of varying sizes, from SMEs to large retail brands.

We have also outlined what we see as the key concerns by introducing a UGC exception for the images industry:

1. A UGC exception would have a significant impact on all images uploaded online, with the benefit of enabling ISPs and SMPs to continue monetising content uploaded or shared on their sites without liability or remuneration for image rights holders. For example, as illustrated in the BAPLA 'Value Gap' diagram (Image 4: Point of Upload), our members have no way of enforcing the rights of rights holders when it comes to someone uploading images without permission. As one member commented, "*We realised some time ago that we could not pursue the tsunami of global misuse.*" Arcaid Images.

2. Incorporating types of works such as 'images' into an exception with no clear definition will cause both legal uncertainty and unilateral unfairness for image rights holders who want to retain value in their works. **An unauthorised image copied thousands of times loses its exclusive value in the marketplace, leaving the rights holder with few means to derive further income from their works.**

3. We believe that, if adopted in its broadest scope, such an exception would enable UGC content to be reused for all commercial and non-commercial purposes with impunity. This would, effectively, extinguish licensing opportunities from creators and their representatives alike (for example aggregating news publishers picking up photographs from a Twitter feed without paying photographers for any uses; or others taking images found online for their own financial gains²).

4. Content production and publication has been democratised by the internet. Businesses have adapted to this new environment and as a result new business models have emerged (e.g. licensing of UGC by incorporating software developed by the UK Copyright Hub; and commercial models like Stockimo³ and similar such as Lobster Media⁴). **We believe introducing this exception will take away the incentive to create these types of new businesses developing with content creation.**

5. ISPs and SMPs are protected by the hosting defence, which gives them full immunity online. Even the French ruling for Google to pay monies to French CMOs so far has yet to show results. **The lack of responsibility undertaken by ISPs and SMPs afforded by the 'Safe Harbour' provision is one our industry has raised for a number of years, and we see as the main cause of the current "Value Block".**

² Richard Prince Slapped With Yet Another Copyright Lawsuit, <https://news.artnet.com/art-world/richard-prince-copyright-lawsuit-754139>

³ <http://www.stockimo.com/>

⁴ <http://lobster.media/>



British Association of Picture Libraries & Agencies

6. Focus should be on making sure that **ISPs and SMPs respect right holders through effective enforcement mechanisms and the new “rules of engagement” under the proposed Art. 13 of the EU Copyright Directive** (such as licensing agreements between rights holders and ISPs).

Recent findings of the Copyright Alliance's Section 512 study suggests "*ISPs must do more to make the process for sending a DMCA notice more clear, including greater transparency, conspicuous placement of DMCA forms, and uniformity.*" It highlights concerns over monitoring infringements, citing that it is too difficult or time-consuming to do so⁵.

For context, Social Media Statistics⁶ as of July 2015, total worldwide population is 7.3 billion:

- The internet has 3.17 billion users;
- There are 2.3 billion active social media users;
- Social networks earned an estimated \$8.3 billion from advertising in 2015;
- 2011 study by AOL/Nielsen showed that 27 million pieces of content were shared every day;
- On Instagram (owned by Facebook), over 80 million photos are uploaded each day, with more than 40 billion photos shared so far;
- In 2015, Instagram was forecasted to bring in \$595m in mobile ad revenue.

If the proposed exception is approved it could open up an economic floodgate for ISPs, SMPs, certain commercial websites, telecoms services and device manufacturers, but not for the copyright owners whose works are exploited. Everyone is encouraged to share what they like, not simply what they own the rights to. It means visual rights holders ultimately lose the ability to enforce their rights.

BAPLA fully supports a creative industry-led solution, particularly one that both maintains creators abilities to generate income through their chosen conduit, and importantly encourages social media platforms take responsibility and work with us. Therefore we believe there is no need to introduce an exception that is not welcomed by the images industry.

We believe it is essential to strike the right balance between protecting images and maintaining the benefits of communication, as it is key to adding value and reaching new markets, however **it is vitally important to redress the current imbalance with exploiting images for the benefit of visual rights holders and promote future creative developments together.**

On behalf of BAPLA

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<http://www.bapla.org.uk>

⁵ <http://copyrightalliance.org/wp-content/uploads/2017/03/Copyright-Alliance-Section-512-%E2%80%93-Empirical-Research.pdf>

⁶ (Source: <https://www.brandwatch.com/blog/96-amazing-social-media-statistics-and-facts-for-2016/>).