

British  
Association of  
Picture  
Libraries &  
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**BAPLA Submission for Call for Views: Modernising the European copyright framework**  
(5 pages, incl. Appendix - BAPLA Value Block Key Issues)

#### 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. Our members have adapted the needs of their B2B clients, and have been in the business of licensing and supplying both still and moving images to a variety of clients in the UK, Europe, and worldwide, for several decades.

#### Members Feedback on Brexit and the EU

As part of this review we undertook a short survey of our members<sup>1</sup>, the majority of whom have European offices or receive image content from European contributors, license content to European clients (between 20% & 65%), and have European staff working for them (over 50% of members replying to the survey). Comments from members about their business as a part of Europe range from, “Our commercial relationship with European customers plays a crucial part of our business, accounting for 40% of our income and licensing arrangements” to “The business we generate from customers in Europe outside of the UK is critical to the success of our overall business. We have staff located in various European offices as well as in London who are dedicated to serving customers in other European countries”, and “The free flow and exchange of content between EU and UK forms the backbone of this company’s business”.

Access to the single market and the enforcement of copyright were highlighted as the two most important issues, with concerns that UK copyright could be used as a bargaining chip with large US platforms offering investment in exchange for a US-style fair use system. In relation to the EU taking steps to harmonise copyright through its Digital Single Market Strategy there was concern over whether there would be a positive or negative impact on the UK if the Government did not adopt in general certain measures proposed, several members saw a negative impact, with one member commenting that “A possible negative impact to the extent that the UK does not fully adopt the outputs of the DSMS”, a cultural heritage member offered, “Negative to be outside the DSMS as Europe has, to date, been a strong supporter of copyright as well as understanding the

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<sup>1</sup> BAPLA Members Survey conducted between October and December 2016, not publicly disclosed.

needs of preservation and heritage”, whilst a small SME stated, “We have seen significant changes to UK copyright law over the past 5 years which for the most part work well, and we believe is successfully underpinned by the EU copyright framework and the Court of European Justice. The fact that the EU commissioners are looking at finding solutions to ensure a supportive copyright regime as part of the Digital Single Market Strategy is something we welcome.”

Specifically on the importance of a strong copyright regime, members agreed. “The protection of copyright is the foundation of creativity”; “Our business is based on a robust copyright framework which allows us to reinvest in the works we produce and licence, anything that could jeopardise it, such as a reduced copyright term or a fair-use system would result in our business model becoming redundant and therefore obsolete”; “Licensing images of this [national collection] helps generate vital income for the gallery. Softening UK copyright law would make it harder for us to control, and generate income from images”.

### **Digital Single Market Strategy (DSMS)**

A significant priority for BAPLA has been to ensure that the interests of image owners are taken into account as the EU copyright framework evolves as part of the EU’s Digital Single Market Strategy. We therefore urge the UK Government to continue to input on the future of EU copyright law. Stability is a key attribute that the creative sector needs during the transition period to leave the EU, and the Great Repeal Bill plays an important part in maintaining it. As one member commented, “Uncertainty impacts on planning, prolonged uncertainty makes it worse for European partnerships which are a foundation of our business. There is financial and copyright uncertainty which all impact on growth”. Therefore ensuring the full application of existing EU Regulations and transposition of EU Directives, which form part of UK copyright law, must be an integral part of this process. We strongly believe it is essential that UK Government, along with UK rights holders, continues to play an influential role in the process of developing the proposals within the European Commission over the next two years, not least because European copyright law forms the backbone of UK copyright law, and therefore we welcome the assurance that the Government intends to do so. We also believe that as the UK Creative Industry is an enviable net exporter to Europe, there is a shared responsibility for Government to continue to protect the rights of rights holder across borders real and virtual.

### **DSM Copyright Directive**

In relation to the proposed Digital Single Market Strategy, our focus in particular is the draft “Copyright Directive” covering a range of measures, which we have highlighted below. Of particularly high importance are developments relating to the liability of online platforms in order to achieve a well-functioning market place. Our industry has reached a tipping point where the consent of a copyright owner is irrelevant in the face of certain online powerhouses. Images online are increasingly used to monetise technology without adequately remunerating rights holders. It is also important to underline that overall BAPLA welcomes the proposed copyright directive, which looks to close the gap on certain issues impacting rights holders.

### **BAPLA’s Key Points:**

(i) Adapting exceptions and limitations to the digital and cross-border environment

#### **Article 3 - Text and Data Mining**

- This exception should be as narrow as possible, as the focus on beneficiaries rather than purpose leaves the way open for the exception to be used for commercial purposes. In the draft it is limited to activities of research organisations which is accepted provided that there is some oversight over their activities so that commercially sensitive information (such as sales trends which may be “mined” from BAPLA members’ databases) are not used to the members’ commercial disadvantage. The UK Government was careful to limit the UK exception to use for non-commercial purposes; we request the same is applied with the same limitation.

(ii) Ensuring wider access to copyright content

#### **Article 7 - Use of out-of-commerce works by cultural heritage institutions**

- We would ask Government to request that there is in place a “best practice protocol” for the use of Out-of-Commerce works, to ensure rights holder are adequately informed about digitisation programmes, able to communicate their permitted rights in using such works, and opt in or out with ease if so desired. The importance on providing a fair and transparent process of rights clearance will be essential in alleviating pressures on income generation for rights holders.

(iii) Achieving a well-functioning marketplace for copyright

#### **Articles 11 & 12 - Protection of press publications concerning digital uses & Claims to fair compensation**

- In defining Publisher’s Rights there should be inclusion for the legitimate rights of others in the value chain, such as picture libraries & agencies.

- In order for a Publishers Right to be effective, the new Directive will also need to amend the definition of communication to the public (ideally via Article 13) by providing that “framing” of visual works (distinct from other types of hyperlinking) is an enforceable act.

#### **Article 13 - Use of protected content by information society providers storing and giving access to large amounts of works and other subject-matter uploaded by their users**

- Value Gap is a Value Block for images. Certain online platforms must take responsibility to engage with and improve the communication between image rights holders and themselves, which we strongly feel must be facilitated by Government. It is no longer enough to dismiss the growing chasm between those platforms that commercialise content through exploitation of the safe harbour provision, including via methods such as framing, and remuneration for rights holders.

- Income and profit from digital use on certain platforms stay beyond the reach of image rights holders, preserved instead within a concentrated technology industry. As one Social Media Trend report stated<sup>2</sup>: “With 23bn active users, social media has immense power.” With images being the most copied and shared content on the Internet, we’re keen to see that the interests of image owners are taken into account.

- We have identified that when it comes to platforms that accept user uploaded images and to aggregators, we are facing a complete VALUE BLOCK for images. Image owners find it impossible to broker licensing deals with these players, e.g. even YouTube’s Content ID system is not available for images (unlike video and music).

- This uneven state of affairs has arisen because the Images industry has not been as litigious as the music and video industries, because the Images industry is more fragmented in nature (a greater number of smaller right-holders and not the same established big players like the film studios and record labels).

- This is not a reason why the images industry should be “left behind” and not be able to benefit from the DSM copyright package.

Our European trade organisation, CEPIC recently took part in an EU Commission presentation, which highlighted our concerns<sup>3</sup>.

#### **Article 14 - Fair remuneration in contracts of authors and performers**

- A transparency obligation is welcome given that it has been rightly, qualified by specificities of the relevant sectors and proportionality. In reference to the BAPLA diagram attached in the appendix, there is a key responsibility that Social Media Platforms must also take in relation to Terms of Service.

#### **Article 15 - Contract adjustment mechanism**

- We recognise that the right to unilaterally change the terms of an agreement (by requesting additional remuneration) is not recognised by English contract law and this is a departure from the well-established principle of freedom to contract. We also recognise that in certain parts of the creative industry, rights holders, including authors and performers, are not always in a position to renegotiate contracts. The example we have provided is common for Social Media Platforms (see appendix). We submit that this mechanism, if retained, should be restricted either to the industry sectors in which the issues Art 15 is purporting to address are particularly

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<sup>2</sup> <https://www.linkedin.com/pulse/ultimate-business-guide-using-social-media-2017-steve-tappin>

<sup>3</sup> <https://polcms.secure.europarl.europa.eu/cmsdata/upload/0fad1600-796c-4a80-b649-6fe21e18159d/copyright-reform-hearing-fodor-cepic-29112016.pdf>

acute, or by introducing clear conditions for when the contract adjustment mechanism will apply, and how.

#### **Final Comments**

The images industry has faced unprecedented challenges in staking a claim in the online value chain. For example, unlike music and video right-holders, image owners are not even able to participate in YouTube's Content ID system. The challenge of protecting images online cannot be overstated - notice & take downs are relatively ineffective to deal with millions of images generated each month, and image search engines are able to take advantage of a current loophole in order to "frame" images without requiring the consent of the copyright owner. BAPLA conducted research last year with its members that support this view.

The UK's strength has always been in recognising the certainty and sensibility of the value chain, but we need clarification online. As well as properly functioning copyright laws, effective enforcement of competition laws is also important. The dominance of certain leviathan platforms poses a significant threat to future innovation and diversity of customer choice when it comes to image based offerings. We wish to see investors encouraged to harnesses advancing technology in a way that allows value to flow back to creators on whose content the success of platforms depends.

We have identified that for images online there is more than a "value gap" but a "value block". We believe there is an opportunity to set a clear precedence of supporting both sides to bridge the gap in that regard, whether in response to leaving the EU or in supporting the implementation of the Digital Single Market Strategy Copyright Directive. If rights owners of creative works are to share in any of the economic value that such works contribute, then robust and comprehensible Government support is needed.

Yours sincerely,

Isabelle Doran, Chairperson

For and on behalf of British Association of Picture Libraries and Agencies Ltd