

## Removing the Value Block: Getty Images Position on EU Copyright Reform

Creators and the public lose out today when online intermediaries display images without recognition or reward to the creator.

Under existing EU copyright law, there exists a perfect storm whereby intermediaries have no incentive to seek to identify or license user uploaded content, lest they gain actual knowledge of what is displayed on their platforms and lose safe harbour protection under the E-Commerce Directive. Compounding this is the “framing” loophole, which enables intermediaries to distribute unlicensed user uploaded content by facilitating the sharing of content utilising framing technology, thus propagating the problem and further disconnecting the viewer from the image rightsholder.

Some intermediaries also frame images from source websites: embedding them in their own websites, displaying them in full size, thus removing the incentive for a viewer to click on the link to visit the source website.

The overall impact is that creators never receive valuable information on prospective buyers which could be used to optimize sales/marketing activities and to inform future content creation investments. The public are also negatively affected, because when the works are displayed outside their proper context, they don't get the full picture and they don't know from who to seek permission to re-use the image, should they wish. Ultimately: without proper remuneration for creators, they cannot continue to enrich the web as they do today, everyone loses out.

Changes to the EU's outdated copyright laws can fix this value block.

Most urgently, we urge co-legislators to implement the so called “value gap” provisions (Article 13), whilst taking account of the fine detail per our below recommendations to ensure that images are not excluded.

Longer term, we ask that policymakers specifically fix the framing loophole, a concept on which we now elaborate.

### Framing vs. other types of hyperlinking

Hyperlinking to images on the Internet is beneficial for all players; it directs users to relevant content, allowing them to jump from website to website and to easily browse high-quality images with the full benefit of the context in which they are published. In contrast, hyperlinks that frame images syphon traffic from websites where images are published.

Production of high-quality photography requires significant investment and is often only possible with the exposure to serious personal risk on the part of the photographer (photographic journalism from conflict zones or natural disaster sites being the most obvious examples). Framing, and the consequent loss of remuneration, diminishes incentives for people to invest in the production of high-quality images. Less high-quality photography available from reliable sources means a more sterile, less dynamic and attractive Internet. It also makes it more difficult to guard against fake news.

### The solutions

To rectify this situation, Getty Images urges legislators to follow a two-step approach:

*Firstly*, it is paramount that co-legislators implement the value gap provisions. However, they should do so paying close attention to the detail to ensure that image owners aren't discriminated against on the grounds that they are the most widely infringed content online and therefore somehow harder to police. Technology exists on the market today that will quickly become available to enable images to be easily licensed under the value gap provisions. Getty Images would gladly allow all of its images to be licensed (our vision is “Getty Images Everywhere”), other photo libraries would undoubtedly do likewise, hence ensuring there would be no negative impact to freedom of expression online.

One of the reasons that the harm to image creators is so severe is because the framing loophole enables Online Content Sharing Service Providers (OCSSP's) to perpetuate the dissemination of unlicensed user uploaded images (by providing share and embed options that allow other users to frame the image as it appears on the OCSSP's website, either elsewhere within the OCSSP's platform or externally). If images are licensed to an OCSSP pursuant to the value gap provisions, this will also allow all of these images to be shared by users of the OCSSP using framing technology, where those images are displayed by non-commercial users (either elsewhere within the OCSSP environment or externally).

*Secondly*, once the value gap provisions are successfully enacted, we ask that policymakers under the next Commission cycle address the framing loophole specifically, by clarifying the scope of Article 3 of the Directive 2001/29/EU to stipulate that framing of content, where this is done in a substitutive or competitive manner, is a communication to the public and

therefore becomes a licensable act in the same way that hosting is currently a licensable act. To complement this change, Getty Images would support the introduction of a new exception for all other types of hyperlinks, where used for navigational rather than appropriation purposes. This additional copyright exception will ensure that ordinary hyperlinking can continue unaffected by the clarification of the communication to the public right to cover acts of framing and that there will be no adverse impact on free speech and free transfer of information online. This will mean a more sensible test for communication to the public online, based on the viewing experience rather than a hidden technical element. It will also follow the direction of the US courts<sup>1</sup>.

## Recommendations to policy-makers

### *Amendments to the current draft Copyright Directive:*

- I. Language added under Recital 38e in the Council text (and Recital 39 in the most draft Compromise amendments circulated by the Parliament rapporteur - dated 12.06.2018) creates an unnecessary and unhelpful distinction between **types of works** to be covered by the obligations upon OCSSPs arising from Article 13. To ensure that image rightsholders are not unfairly excluded from the value gap provisions, all references to “types of work” or “type of content” should therefore either be deleted or clarified such that the type of works/content is only relevant to the precise form of measures to be deployed, not whether measures *need* to be deployed. Similarly, in Recital 38e in the Council text (and in Article 13.3 of the Parliament draft text), it should be clarified that it is the “**existence**”, not “**availability**”, of technologies that is relevant.
- II. Legislators should resist pressure to further extend the list of exempted services via amendments to Article 2, Article 13, Recital 37 and Recital 38, beyond those strictly necessary to prevent the Directive from being applied in a disproportionate way. Legislators should proceed on the basis that this legislation will be implemented and enforced in a common-sense fashion. To introduce an unwieldy and extensive list of exempted services, or to introduce a revenue-based threshold for OCSSPs, will only add uncertainty and present possible loopholes.
- III. The **diligent operator clause** for OCSSPs proposed by the Council under Article 13/Recital 38c introduces an unhelpful element of legal uncertainty to the Directive. There is genuine concern amongst rightsholders that this provision could in fact make it more difficult to enforce their rights. We ask that legislators consider the possibility of amending this provision to take account of this concern.
- IV. Complementary language should be added to Recital 38, paragraph 2 of the Commission text (and Recital 37a of draft Compromise amendments circulated by the Parliament rapporteur) which clarifies that “**optimizing**” of the uploaded works as an indicator that an OCSSP is active, also includes the “displaying of works or other subject matter on a third-party website through facilitating the embedding of a framed hyperlink.”
- V. Article 14.1a. introduced by the Council should not be endorsed as it is unnecessary and may disrupt the value chain, e.g. if a sub-licensee’s cost of complying with an information request causes it not to license content in the first place.

### *For the next Commission, future amendments to the Information Society Directive:*

- VI. Straightforward language should be inserted to clarify that when a person provides access to content using framing technology in a substitutive or competitive manner (for images, meaning displaying the image other than as a thumbnail for pure navigational purposes), they perform an act of communication to the public.

This amendment should be complemented by introduction of a new exception for hyperlinks, provided that (i) they lead to a source website that has not imposed restrictions on access; and (ii) there is no awareness on the part of the person creating the hyperlink that it is linking to infringing content.

**About Getty Images:** Getty Images is one of the most trusted and esteemed sources of visual content in the world, with over 300 million assets including [photos](#), [videos](#), and [music](#), available through its industry-leading sites [www.gettyimages.com](http://www.gettyimages.com) and [www.istock.com](http://www.istock.com). The Getty Images website serves creative, business and media customers in nearly every country in the world and is the first place people turn to discover, purchase and share powerful visual content from the world’s best photographers and videographers. Getty Images works with over 240,000 contributors and hundreds of image partners to provide comprehensive coverage of more than 160,000 [news](#), [sport](#) and [entertainment events](#) each year, impactful [creative imagery](#) to communicate any commercial concept and the world’s deepest digital archive of [historic photography](#). Getty Images also has a consumer facing website, [www.gif.com](http://www.gif.com), telling the stories behind the images in a visually immersive fashion. Getty Images mission is to move the world with images.

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<sup>1</sup> Case 1:17-cv-03144-KBF, JUSTIN GOLDMAN, -v- BREITBART NEWS NETWORK, LLC & OTHERS: Opinion and Order US DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, Document 169 - Filed 02/15/18 ([https://www.eff.org/files/2018/02/15/goldman\\_v\\_breitbart\\_-\\_opinion.pdf](https://www.eff.org/files/2018/02/15/goldman_v_breitbart_-_opinion.pdf))