Dear Mr Timmermans,

The members of the Standing Committee for Security and Justice have taken note with interest of the package of new EU rules on copyright, as presented by the European Commission on 14 September 2016. Some parliamentary parties still have questions about the proposal for a directive on copyright in the Digital Single Market¹ (the proposed directive) and the proposal for a regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes² (the proposed regulation).

The members of the parliamentary party of the VVD (People’s Party for Freedom and Democracy) have taken note with interest of the proposed directive. They agree with the Dutch government that it is important for the EU’s regulatory framework on copyright to remain usable in a digital environment affected by a rapid succession of technological developments. They also endorse the principle that support should be provided for the creation, provision of open access to and use of works and performances protected by copyright, a related right or database right – and hence innovation. However, they do still have a number of questions about the proposed directive.

The members of the parliamentary party of the SP (Socialist Party) have taken note with interest of the package of rules and would like to put a number of questions to the European Commission about this. They look forward to receiving the answers.

Proposed directive
The proposed directive obliges member states to introduce certain exceptions to and limitations on copyright in order to adapt copyright to the Digital Single Market. In order to address the

¹ COM(2016) 593; for the proceedings in the Senate see electronic dossier number E160037 at www.europapoort.nl.
² COM(2016) 594; for the proceedings in the Senate see electronic dossier number E160038 at www.europapoort.nl.
legal uncertainty about text and data mining, it is proposed to introduce an exception that would allow text and data mining to be conducted for scientific research purposes without copy-
right impediments. Why is the proposed exception limited to scientific research purposes and not to research purposes in a broader sense? After all, text and data mining can equally well be conducted for the research purposes of private companies (or rather their R&D departments). The members of the parliamentary VVD party consider that limiting the exception to scientific research purposes alone may possibly hamper innovation since it is often initiated by private research institutes and companies as well. Is the European Commission prepared to expand the scope of the proposed exception to include, for example, both scientific and applied research purposes, regardless of whether the research is conducted by public or private institutions?

The so-called ‘best seller’ provision is intended to give the creator the right to additional remu-
neration if the proceeds of the exploitation are no longer proportionate to the remuneration agreed in the contract for the exploitation of the rights. Does the European Commission yet have an idea of how and by whom a decision will be taken on whether remuneration is dispro-
portionately low in a specific situation? The members of the parliamentary VVD party wonder whether the Copyright Contract Law Disputes Committee (Geschiedenicommissie Auteurscon-
tractenrecht) could play a role in this connection in the Netherlands.

The members of the parliamentary SP party have examined with interest the proposals on copy-
right in the Digital Single Market. They have taken particular note of the proposals concerning the use of these rights in education. They agree with the European Commission that copyright may not hamper research and education. On the other hand, they wish to prevent a situation in which unauthorised copying can take place under the guise of education and research. How does the European Commission propose to prevent this?

The parliamentary SP party members also have questions about the proposal to make a lici-
 sing agreement obligatory for parties who make news and other forms of articles accessible on the internet. They would like to know whether the European Commission does or does not in-
tend to introduce related rights for publishers. Is it correct that services such as Google, which through their search engines provide links to press releases or other information on the internet, require a licence for this purpose? Can the European Commission explain how this contrib-
utes to the formation of a Digital Single Market?

And how does the European Commission propose to prevent the opposite from happening, namely that providers of uploaded information who do not take technical measures because they are in favour of providing their information free of charge or because the material is not copyright-protected, for example because it has been made available through Creative Com-
mons, are put in a worse position than providers who are paid for transmission? Can it explain how this relates to the principle of net neutrality it advocates so fervently?

Moreover, it appears that in countries where attempts have been made to introduce this mecha-
nism, it actually has an adverse effect because it becomes almost impossible to find publishers, particularly small publishers, which thus see their incomes fall. Clearly, as long as this point is not clearly resolved for the members of the parliamentary SP party, they can in no way support this proposal.
In addition, the members of the parliamentary SP party have concerns about article 13 of the proposed directive. This is how the European Commission intends to impose an obligation on internet platforms to filter copyright-protected material. Quite apart from the fact that this will entail enormous costs and may curtail freedom of expression on the internet, all the material uploaded on the internet has in fact been made by someone at some point in the past and is therefore copyright protected. The filtering will have to be carried out on the basis of information supplied by the author. This will bring about a divide between on the one hand the self-generated content of the new generation of internet users and on the other the creator, whose interests are represented by an organisation of which he or she is a member. How does the European Commission view this divide? How does it believe this will facilitate the formation of the Digital Single Market? Isn’t it in fact possible that such a measure might actually delay the development of new initiatives owing to the costs it entails and the possible risks that may have to be confronted in retrospect. A response from the European Commission would be appreciated.

Nor do the members of the parliamentary SP party consider that the proposal improves the position of the creator, since it focuses on the publishers. How does the European Commission consider that this proposal strengthens the position of the creator? What options have been considered in this connection? The reflections of the European Commission would be appreciated.

As the European Commission rightly notes, the creators are often in a weak position in relation to those who exploit their work. The members of the parliamentary SP party are therefore pleased that the Commission wishes to make proposals to improve this. However, they would like the Commission to take another look at more far-reaching possibilities in this field. As the Commission itself notes that creators are often reluctant to enforce their rights before a court or tribunal, it is questionable whether alternative forms of recourse would do much to improve their position. After all, the creator is often a one-man business whereas the client has more means at its disposal and is, by definition, more likely to survive in a process of attrition. Would it therefore not be better to examine how the creator’s legal position can be further enhanced? What possible ways of improving the creator’s position did the European Commission examine and what conclusions did it draw from this? Does it see any other possibilities?

Proposed regulation

The members of the parliamentary SP party welcome the removal of the obstacles to simulcasting services (TV channels transmitted online alongside television broadcasts). Viewers find it incomprehensible why they should immediately have to pay if, for example, they have missed the first ten minutes of a live broadcast and wish to view them using the catch-up service, whereas they can immediately rewatch the programme free of charge if they have recorded it. The fact that this is still the case is itself an indication of where this proposal falls short. If the European Commission’s aim is to create a digital market, it should no longer contain dividing walls. These still exist in this proposal. This is because the smaller broadcasting organisations do not have the financial resources to fund such a large market. This is inherent in the manner in which this is regulated by the European Commission, namely through mandatory membership of a collective management organisation (CMO). As this mandatory membership means it is not
necessary to continue negotiating for ever before rights can be obtained, it is a sympathetic solution. On the other hand, right holders can choose which CMO they wish to join. Collective management is in this way suddenly becoming so large scale that the members of the parliamentary SP party wonder how the European Commission intends to guarantee that not only the right holder but also and above all the creator is adequately compensated.

The members of the parliamentary SP party regret that the European Commission has not examined possible solutions to the problem of the dividing wall, certainly as regards online broadcasts. The wall is hard to demolish because it is causing the market to become so large that the costs of copyright are becoming too high for small providers. The above-mentioned members welcome the fact that the European Commission is monitoring the position of the small providers precisely in order to prevent a monopoly, but consider that other solutions would also have been possible. Opening up provision may perhaps make the market rather larger for more countries, but often not much larger. For example, a sudden explosive growth in the number of viewers of the 8 O’Clock News need not be expected, but it is incomprehensible that Dutch people abroad cannot view it at present. Why has the European Commission not looked for creative solutions to this problem?

However, collective management in Europe is also still very fragmented. This is an obstacle to the simultaneous broadcasting of programmes capable of attracting a large European public. What is the European Commission’s view on this? Has it considered how the fragmented collective management can be improved? If so, why has so little attention been paid to this part of the Digital Single Market, particularly since it is the digital market which is above all limited by fragmentation?

Finally, the members of the parliamentary SP party still have the following questions. Can the European Commission indicate what it considers to be the difference between video-on-demand services and catch-up services? Why does it still differentiate between video-on-demand services and catch-up services? The above-mentioned members would also request the European Commission to provide more information about ancillary services.

The members of the Standing Committee for Security and Justice look forward with interest to reading the answers of the European Commission and would be grateful to receive them as quickly as possible but in any event no later than three months from the date of this letter.

Yours sincerely,

Dr A.W. Duthler
Chair of the Standing Committee for Security and Justice