

Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market

Fields marked with * are mandatory.

INTRODUCTION

The Directive on Copyright in the Digital Single Market (Directive 2019/790/EC, the 'DSM Directive') requires the Commission to issue guidance on the application of Article 17, in particular regarding the cooperation between online content-sharing service providers and rightholders. The guidance should take into account the discussions held during the stakeholder dialogue meetings organised by the Commission pursuant to paragraph 10 of that article. The DSM Directive is addressed to the Member States who are required to transpose it by 7 June 2021. At this stage, the guidance will focus on assisting Member States in that task.

Following an open call for interest to participate in the stakeholder dialogue, the Commission organised six stakeholder dialogue meetings between October 2019 and February 2020 to gather the views of relevant stakeholders on the main topics related to the application of Article 17.

This consultation paper builds on the discussions at the stakeholder dialogue and presents the initial views of the Commission services with the view to finalising the Commission guidance.

We encourage the representative organisations to gather the views of their members and to provide, to the extent possible, a coordinated reply to the consultation. Where this is not possible, replies can be provided by individual members.

About yourself

* I'm giving my contribution as

- Organisation representing users, including fundamental rights organisations
- Organisation representing online content-sharing service providers
- Organisation representing rightholders
- Public authority
- Other

* Name of your organisation/authority

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* Are you registered in the Transparency Register of the EU?

- Yes
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I. SCOPE OF SERVICES COVERED BY ARTICLE 17

Background

Article 17 applies to online content-sharing service providers as defined in Article 2(6) of the Directive. An online content-sharing service provider is defined as an information society service provider of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Article 2(6) also provides a non-exhaustive list of excluded providers of services, which are not online content-sharing service providers within the meaning of the Directive.

Special rules apply to new online content-sharing service providers, which meet the conditions in Article 17 (6).

Possible elements for the guidance

The guidance should indicate how to transpose the definition of 'online content-sharing service provider' into national law and explain the different elements of the definition itself, as well as of the list of service

providers, which are expressly excluded.

The non-exhaustive nature of the exclusion for particular online service providers by use of the term 'such as' denotes that other service providers could also qualify as an excluded service provider on a case-by-case basis.

In order to provide legal certainty, Member States should explicitly set out in their implementing laws all elements of the definition of 'online content-sharing service provider' in Article 2(6), including the excluded service providers set out in Article 2(6). As regards these excluded service providers, the guidance should state that the Union legislature has expressly excluded from the scope of the definition the particular examples set out in Article 2(6).

For other services, which are not identified as examples but which may also be excluded, a case-by-case assessment would be necessary.

Recital 63 states that a case-by-case assessment would be required in order to determine whether an online service provider falls within the scope of the rules in Article 17. This does not affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to excluded service providers using copyright-protected content, as recalled by recital 64.

Article 2(6) should be read in the light of recitals 62 and 63. In order to increase legal certainty as to the scope and as an aid to interpretation, Member States should be advised to also transpose elements of Recitals 62 and 63. Member States should apply the different elements of the definition, such as the concept of 'large amount of copyright protected content' in the light of these recitals, while they should refrain from further defining these elements going beyond the text of the directive, in order to avoid fragmentation.

Member States should bear in mind that the definition is drafted in a sufficiently neutral manner, which takes account of possible changes in modes of delivery, technology and usage and the fact that the DSM Directive will have to be applied in circumstances, which may change over time.

Question 1: Are there any additional elements related to the definition of an online content-sharing service provider, besides those outlined above, which you consider require some guidance? If yes, please indicate which ones and how you would suggest the guidance to address them.

2600 character(s) maximum

The guidance should address all elements of the definition. Especially it should provide a clarification of the following components:

- “a large amount of copyright-protected works or other protected subject matter” - so that merely providing to third party users opportunity to upload files shall result in a service provider being qualified as the OCSSP (regardless of the scale of such activity, and regardless of whether users actually take this opportunity),
- “profit-making purposes” - account should be taken not only of the current profits but also earning potential (it is often the case that ‘pirate’ websites are free to use, however their database itself has an earning potential). Thus, the emphasis should be placed on OCSSP’s proactive role as they organize and promote content uploaded by users for profit-making purposes, regardless of the measures taken.

In addition, it should be noted that since the adoption of the DSM Directive a growing trend of “off-platforms infringements” can be noticed. This is a big issue especially with major platforms (e.g. YouTube, Facebook). Apart the illegal content stored on their platforms there are also materials posted there that direct users to the illegal content (e.g. by following links in the videos or in the comments). Importantly, such indirect access to infringing content prevails on the consumption of video materials stored on internet platforms.

II. AUTHORISATIONS (Art. 17 (1-2))

Background

Article 17(1) requires Member States to provide that online content-sharing service providers, as defined in Article 2(6), perform an act of communication to the public or an act of making available to the public for the purposes of this Directive when they give the public access to protected content uploaded by their users and therefore need to obtain an authorisation from relevant rightholders, for instance by concluding a licensing agreement. Under Article 17(2) the authorisation obtained by the online content-sharing service providers must also cover the acts carried out by users, under certain conditions.

Possible elements for the guidance

(i) Authorisation models

The guidance should explain how Member States should approach the requirement of ‘authorisation’ in Article 17(1). The term ‘authorisation’ is not defined and it should be interpreted in the light of the aim and objective of Article 17.

Article 17 is a *lex specialis* to Article 3 of Directive 2001/29/EC and of Article 14 of Directive 2000/31/EC. This is confirmed by Recital 64, which states clearly that Article 17 does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content. As such, Member States would not be able to rely in their transposition of Article 17 on their implementation of either of those directives in relation either to the notion of ‘authorisation’ or indeed for the notion of ‘communication to the public’. Therefore, Member States should explicitly introduce into national law the notion of ‘authorisation’ for the *lex specialis* ‘act of communication to the public’ in Article 17(1).

Article 17(1) provides that an authorisation may for instance include a licensing agreement and this is also set out in Recital 64. Accordingly, an authorisation may take the form of a licensing agreement but may also take another form in national law. The guidance could give indications of different authorisation schemes that Member States could provide for, taking into account the specificities and practices of different sectors. Both individual and collective licensing solutions should be possible. Extended collective licences (ECL) could be considered in specific cases and for specific sectors, provided that they comply with the conditions of Article 12 of the DSM Directive.

The guidance would also recall that rightholders are not obliged to grant an authorisation to online content-sharing service providers, as explained in recital 61. Nevertheless, where rightholders do not grant an authorisation, online content-sharing service providers are not liable for copyright infringements if they comply with the conditions set out in Article 17(4) (see section III.1).

In order to foster the grant of authorisations in any chosen form at national level and to ensure the *effet utile* of Article 17(1), Member States could be recommended to maintain or establish voluntary mechanisms to facilitate agreements between rightholders and service providers. For example, voluntary mediation mechanisms could be considered in specific cases or sectors to support parties willing to reach an agreement but facing difficulties in the negotiations.

(ii) Authorisations covering users

Member States should implement explicitly in their legislation Article 17(2) under which an authorisation granted to online content-sharing service providers should also cover acts carried out by (i) users acting for non-commercial purposes or (ii) users whose activity does not generate significant revenues. It is important to bear in mind that these authorised uses are in addition to what else is authorised for content-sharing service providers.

Under this provision, authorisations granted to service providers are deemed to cover the acts, within the material scope of the authorisation granted, that are carried out by users falling in any one of these categories (non-commercial purpose or non-significant revenues). It is sufficient for a user to satisfy one of these conditions to be covered by the authorisation.

The guidance could illustrate this provision, which would for example cover users uploading a home video including music in the background or users uploading a tutorial generating limited revenues, which includes music or images when no exceptions apply. On the other hand, users acting on a commercial basis and deriving significant revenues from their uploads would be outside the scope of or not covered by that authorisation (unless the parties have explicitly agreed to cover also these users contractually). Member States should not set out quantitative thresholds when implementing the concept of 'significant revenues' which should be examined on a case-by-case basis. Member States should be recommended to assess the notion of 'significant revenue' by reference to all the circumstances of the user's activity in question, including whether there is a licence agreement where the parties have agreed on specific thresholds (which should however not go below what is authorised under Article 17(2)).

Member States should interpret the notion of authorisation in Article 17(2) in light of recital 69 according to which service providers do not have to obtain a separate authorisation when rightholders have already authorised users to upload specific content. In these cases, the act of communication to the public has already been authorised within the scope of the authorisation granted to the user. The same recital also indicates that service providers should not presume that their users have in all cases obtained all the

necessary authorisations for the content they upload.

In order to enhance transparency and legal certainty, the guidance could encourage the Member States to put in place an exchange of information on authorisations between rightholders, users and service providers.

Question 2: Are there any additional elements related to authorisations under Article 17(1) and 17 (2), which should be covered by the guidance? If yes, please explain which ones and how you would suggest the guidance to address them.

2600 character(s) maximum

OCSSPs should be obliged to actively seek an appropriate authorization from rightholders. In order to do so, they should demand relevant information from the users uploading content on their platforms. Such inquiry should be conducted prior to the file upload and should refer to the main parameters of content to be uploaded. In order to enable OCSSPs to establish a potential necessity of acquiring the authorization, the minimal scope of the information required from the users should cover: a) information on the presence in the uploaded material of any external (i.e. not originally made by the user) copyright-protected works or other protected subject matter, b) information regarding the source of that external material and rightholder, c) information on whether the user contacted the rightholder and was granted an authorisation to use the external material (if so, an authorisation proof should be attached or presented on demand). In cases when the user declares that the external material had been used in the content being uploaded, and no authorisation from a rightholder had been obtained, a OCSSP should suspend the publication of such content and contact the rightholder in order to seek an appropriate authorization.

Extended collective licences could be considered only in special cases and for specific sectors, provided that the rightholders acting within these specific sectors have the right to exclude themselves from such mechanism. Examples include television broadcast content providers.

Question 3: Do you have any concrete suggestions on how to ensure a smooth exchange of information between rightholders, online content-sharing service providers and users on authorisations that have been granted?

2600 character(s) maximum

As a general rule, there can be no presumption that appropriate authorisation has been granted. In any case rightholder's consent should be explicit. The obligation to check whether the appropriate authorisations have been granted should be borne by OCSSPs.

If the 'collective licensing solution' is adopted, the collecting societies must be obliged to keep records on granted authorisations or on rightholders who excluded themselves or/and their content from such mechanism. However, the principle of contractual freedom must be maintained and rightholders cannot be forced to adhere to forms of collective licensing.

III. SPECIFIC LIABILITY REGIME UNDER ARTICLE 17

Article 17(4) establishes a specific liability regime for online content-sharing service providers that have not obtained an authorisation from the relevant rightholders under the applicable national rules implementing Article 17(1). Therefore, the *effet utile* of this provision will depend on the system of 'authorisation' put in place by the Member State under Article 17 (1) and (2). As outlined in recital 61, the goal of Article 17 is 'to

foster the development of the licensing market between rightholders and online content-sharing service providers'. Article 17(4) only becomes applicable in those cases in which the primary goal of authorisation of acts of communication to the public performed by online content sharing service providers within the meaning of Article 17(1), for instance by concluding a licensing agreement, could not be achieved.

In the absence of an authorisation, Article 17(4) sets out three cumulative conditions, which service providers may invoke as a defence against liability.

The conditions in Article 17(4) are subject to the principle of proportionality, as specified in Article 17(5). In this respect, the guidance should give indications to Member States on the practical application of the proportionality criteria to the conditions set in Article 17(4), notably how the type, size and audience of the service, the availability of suitable and effective means and the related costs, as well as the type of content uploaded by the users could be considered in different cases.

1. BEST EFFORTS TO OBTAIN AN AUTHORISATION (ARTICLE 17(4)(a))

Background

The first condition in Article 17(4) letter (a) is that service providers should be liable for unauthorised acts of communication to the public, including acts of making available to the public, unless they demonstrate they have made best efforts to obtain an authorisation. The principle of proportionality, as set out in Article 17(5), should be taken into account when assessing whether a service has made its best efforts under Article 17(4) letter (a). Pursuant to Article 17(8), the application of Article 17 should not lead to any general monitoring obligation.

Possible elements for the guidance:

The guidance could give non-exhaustive indications of actions carried out by service providers that could constitute best efforts to obtain an authorisation by the service providers. In particular, it should illustrate, which action on the part of service providers would constitute best efforts. This would include any action taken by service providers to seek out and/or engage with rightholders and the response, if any, to such solicitation and/or engagement by rightholders. Member States may wish to include such actions, which could, if relevant, vary from sector to sector, in their transposition law.

The authorisation models defined by Member States pursuant to Article 17(1) will have an impact on how easily service providers may be able to fulfil the requirement of 'best efforts' to obtain an authorisation. The threshold of 'best efforts' may be more easily satisfied where a Member State has taken measures to facilitate the grant of authorisations, for example with regard to licensing models, mediation mechanisms or exchange of information. Where a Member State has opted for a system, which leaves greater flexibility in the authorisation regime, service providers may need to adduce evidence that they have tried and been unable to get an authorisation. Keeping records of service providers' engagement with rightholders may help addressing this situation. The evidential standard to prove best efforts would depend therefore on the type of authorisation in national law. For example, participation in a voluntary mediation, where available, could be taken into account in order to satisfy best efforts.

The guidance should recall the importance of applying the best efforts obligation on a case-by-case basis and according to the proportionality principle and the criteria provided for in Article 17(5).

To illustrate the best effort obligation, the guidance should make clear that service providers have to engage proactively as a minimum with rightholders which can be easily identified and located, in order to seek an authorisation. This includes rightholders representing a broad catalogue of works or other subject matter, or their representatives with a mandate to act on their behalf such as collective management organisations (CMOs) acting in accordance with Directive 2014/26/EU.

At the same time, in accordance with the principle of proportionality, service providers should not be expected to proactively seek out all rightholders whose content may be uploaded on their services, in particular those who are not easily identifiable by any reasonable standard. The guidance should however explain that online content-sharing service providers should as a rule enter into negotiations with those rightholders that wish to offer an authorisation for their content, irrespective of whether their type of content (eg. music, audio-visual content, images, text, etc...) is prevalent or is less common on the website of the service provider. Nevertheless, pursuant to the principle of proportionality, in certain cases (notably in case of smaller service providers) a lower level of effort to obtain an authorisation may be expected for types of content which are less common on the website of a given service provider (e.g. for images or texts on a video-sharing platform).

In the light of Recital 61, licensing agreements should be fair and keep a reasonable balance between both parties. That recital also states that rightholders should receive appropriate remuneration for the use of their works or other subject matter. As a consequence, service providers refusing to conclude a licence offered on fair terms and which maintains a reasonable balance between the parties should not be considered to have deployed their best efforts to obtain an authorisation. On the other hand, service providers should not be required to accept licensing offers that are not on fair terms and which do not keep a balance between the parties, including as regards the remuneration to be paid.

The guidance should refer to the relevant provisions of Directive 2014/26/EU applying to licences negotiated and concluded by CMOs, in particular Article 16 (conducts of negotiations and licencing terms) and Article 35 (resolution of disputes). As mentioned under Section II, Member States may also maintain or establish voluntary mechanisms aimed at facilitating the conclusion of licensing agreements between online content-sharing service providers and rightholders.

Question 4: In which cases would you consider that an online content-sharing service provider has made its best efforts to obtain an authorisation, in light of the principle of proportionality? Please give some concrete examples, taking into account the principle of proportionality.

2600 character(s) maximum

OCSSPs should be obliged to actively seek an appropriate authorization from rightholders. Therefore, OCSSPs should be obliged to demand relevant information from the users uploading content on their platforms (prior to the upload). If it is determined that no authorisation had been granted or the user had not provided any evidence to the contrary, OCSSPs shall contact the rightholder and enter in good faith into negotiations (taking account the business model adopted by the rightholder). Before granting such authorisation, the content in question shall not be published. It is important to point out in the guidance that the failure to achieve an agreement between a rightholder and an OCSSP shall not be automatically regarded as "best efforts to obtain an authorisation". In such case the OCSSP shall be prohibited from publishing the content covered by the negotiations.

Question 5: In your view, how should online content-sharing service providers, in particular smaller service providers, make their best efforts to obtain an authorisation for content, which is less common on their service?

2600 character(s) maximum

Patterns of conduct should be standardized. It should not matter whether the content is “less common on the website of a given service provider”. Also, from the rightholder point of view, the availability of illegal content on the website of a smaller OCSSP, does not make it any less damaging. That is why the guidance shall make it clear that all OCSSPs shall actively seek an appropriate authorization from rightholders, participate in negotiations in good faith and suspend the publication of the content in question until the conclusion of said negotiations.

Question 6: Are there any additional elements related to Article 17(4)(a), which should be covered by the guidance besides those outlined above? If yes, please explain which ones and how you consider the guidance should address them.

2600 character(s) maximum

The guidance should highlight the need to balance the various interests at stake. As mentioned in Recital 61, licensing agreements should be fair and keep a reasonable balance between both parties. Rightholders should receive appropriate remuneration for the use of their works or other subject matter. However, as contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements. At the same time, the guidance should explain that it is not enough for online content-sharing service providers to simply enter into negotiations with those rightholders that wish to offer an authorisation for their content. It is also necessary to highlight and clarify that ‘best efforts’ apply to genuine actions, carried out in good faith and not feigned or sham measures (undertaken to delay the removal of the infringing content).

In relation to seeking out rightholders whose content may be uploaded, one possibility to consider is using solutions adopted in the area of orphan works.

2. ‘BEST EFFORTS’ TO AVOID UNAUTHORISED CONTENT (Art. 17(4)(b))

Background

The second condition set out in Article 17(4) is that online content-sharing service providers should be liable for the use of unauthorised content unless they demonstrate that they have made their best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and other subject matter for which the rightholders have provided them with the relevant and necessary information. The principle of proportionality, as set out in Article 17(5), and Article 17(7) should be taken into account. Pursuant to Article 17(8), the application of Article 17 should not lead to any general monitoring obligation.

Possible elements for the guidance:

Member States should bear in mind that these provisions are subject to the obligation on them in Article 17 (7) and (9) to ensure that legitimate uses remain unaffected by the cooperation of service providers with rightholders. The guidance should give indications to Member States on how this could be achieved, as explained in section IV.

The guidance should recommend that in their implementing laws Member States should not mandate the use of technology or impose any specific technological solutions on service providers in order to demonstrate best efforts. This would not only ensure a technologically neutral and future proof application of Article 17(4)(b) but also provide for a less intrusive approach. The service providers together with rightholders may cooperate on the best way to approach identification of the works in question, including by recourse to technology taking into account that the cooperation should not lead to any general monitoring obligation.

The guidance should underline that service providers have to act diligently when making their best efforts to implement any relevant solutions. As stated in Recital 66, to assess whether a given service provider has made its best efforts, account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments. However, service providers should remain free to choose the technology or the solution that they consider the most appropriate to comply with the best efforts obligation in their specific situation, given that account should be taken of the principle of proportionality.

The stakeholder dialogue showed that content recognition technology is already used today to manage the use of copyright protected content, at least by the major online content-sharing service providers. Besides content recognition technology based on fingerprinting, other solutions, such as watermarking, solutions based on metadata and key word search or a combination of different technologies are currently deployed to detect unauthorised content.

Therefore, in most cases, it is expected that service providers will rely (or continue to rely) on technological tools in order to comply with their obligation under Article 17(4)(b) but it is not a prerequisite for the application of Article 17(4). The guidance should in this context recall that the deployment of any solution, including use of technology, such as content recognition technologies, has to respect Article 17(7) and 17(9), which lays down safeguards for legitimate uses (see section IV below).

The guidance should also recall the importance of applying the 'best effort' obligation on a case-by-case basis and according to the proportionality principle and the criteria provided for in Article 17(5). In this respect, the guidance should give indications to Member States along the following lines:

- The type, size and audience of the service: larger service providers with a significant audience may be expected to deploy more advanced and costly solutions/technologies than 'smaller' service providers, with more limited audiences and resources. It could be more proportionate to expect smaller service providers to resort to simpler solutions (like metadata or key word search) as long as these solutions are effective. In some cases, notably for small service providers, relying on ex post action following rightholders' notifications (notice and take down) may be proportionate, as explained in recital 66.
- The availability of suitable and effective means and the related costs should also be considered, for example when service providers buy solutions from third parties/ technology providers, when these are developed in-house as well as the costs related to human review in the context of disputes (see Section IV). The cumulative cost of different solutions that may need to be implemented by a service provider should also be considered, as well as limitations of technologies depending on the type of content.

- The type of content uploaded by the users: when a service provider makes available different types of content, the level of efforts to be made may vary depending on whether the content is prevailing in their website or residual. It can be expected that service providers make more efforts regarding the former as compared to the latter.

In line with Article 17(4)(b), the guidance should underline that the best efforts to ensure the unavailability of specific unauthorised content are to be assessed on the basis of the *'relevant and necessary information'* rightholders must provide to online content-sharing service providers. Whether any information provided by rightholders is "relevant and necessary information" in any given situation should be assessed on a case-by-case basis. Recital 66 specifies that if no such information is provided by rightholders, service providers are not liable for unauthorised uploads of unidentified content.

The guidance would provide some examples of what may constitute relevant and necessary information in different cases. Such information will vary depending on the solutions deployed by service providers (for example metadata on the work such as title, author/producer, duration; fingerprints or the actual content file). The information provided by rightholders should be relevant and accurate to allow service providers to take action on that basis. Member States should be free to define sanctions for abuse of the cooperation mechanism laid down in Article 17, such as the provision of false information.

Flexibility could be left to rightholders and service providers to agree on mutually convenient cooperation arrangements in view of ensuring the unavailability of unauthorised content, within the boundaries of the safeguards for legitimate uses.

Question 7: In which cases would you consider that an online content-sharing service provider has or has not made its best efforts to ensure the unavailability of specific unauthorised content in accordance with high industry standards of professional diligence and in light of the principle of proportionality and the user safeguards enshrined in Article 17(7) and (9)? Please give some concrete examples.

2600 character(s) maximum

The best example of successful cooperation between rightholders and service providers is YouTube service with its Content ID tool. The mechanism used within YouTube should be established in the guidance as the standard for making the "best efforts to ensure the unavailability of specific unauthorised content in accordance with high industry standards of professional diligence".

As for other examples, a common practice among our members is to send information to selected (1) online content-sharing service providers and inform them about the release of the new content (e.g. new original tv series) which will be legally available only on rightholder's website/platform etc. Such notification implies that every copy released outside rightholder's medium should be considered as unauthorised content. In this situation information provided by rightholder is "relevant and necessary information" in accordance with Article 17(4)(b). After the premiere, if the rightholder's content is absent on selected website or when it is indeed available but removed without any further notifications and delay, then it should be considered that this online content-sharing service provider has made "its best efforts to ensure the unavailability of specific unauthorised content in accordance with high industry standards of professional diligence". Nevertheless, such assessment should be conducted on a case-by-case basis.

However, the vast majority of OCSSPs limit themselves to providing e-mail address for reporting infringements on their websites, and then react with varying delays to the rightholders' claims. Such manner of acting shall not be deemed as making "its best efforts to ensure the unavailability of specific unauthorised content in accordance with high industry standards of professional diligence". Also, in many cases the implemented content blocking mechanisms are illusory due to the fact that the content that has been

removed once can be re-uploaded, and there is no penalty for users who have repeatedly committed violations. In such cases stay down mechanism is not working and that is why the liability exemption mechanism provided for in Article 17 should not apply.

(1) As part of our “Follow the Money” campaign we have created the Table of Reported Infringements - a document containing information about the websites offering audio-visual content without rightholder’s permission.

Question 8: Which information do you consider ‘necessary and relevant’ in order for online content-sharing service providers to comply with the obligation set out in Article 17(4)(b)?

2600 character(s) maximum

Terms “necessary and relevant” should be interpreted as minimal information required for the identification of content and its rightholder (e.g. identification of the rightholder, title of the work, and its production date). Terms in question should not be left to the OCSSP’s arbitrary interpretation.

Question 9: Are there any other elements related to the best efforts to ensure the unavailability of unauthorised content, besides those outlined above, for which you think some guidance is needed? If yes, please explain which ones and how you consider the guidance should address them.

2600 character(s) maximum

- It is crucial to introduce legal mechanisms that would force website administrators to implement solutions that work instantly.
- Apart from costs of solutions/technologies that may need to be implemented by service providers in order to comply with their obligation under Article 17(4)(b), the guideline should also consider the increasing costs for rightholders of monitoring and sending notices to enforce the removal of illegal content. Often it occurs that mechanisms to effectively combat illegal content also require costly solutions/technologies, unavailable for ‘smaller’ rightholders with limited resources. So far, this problem seems to have been disregarded.
- Attention should be given to safety issues related to storage of reference files provided by rightholders.

3. NOTICES SUBMITTED BY Rightholders TO REMOVE UNAUTHORISED CONTENT AND THE RELEVANT AND NECESSARY INFORMATION TO PREVENT FUTURE UPLOADS (ART. 17(4)(c))

Background

The third condition set out in Article 17(4) (c), which is also subject to the principle of proportionality laid down in paragraph 5 and the safeguards for legitimate uses in paragraph 7, is that online content-sharing service providers should be liable for the use of unauthorised content unless they demonstrate that they have acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and that they have made best efforts to prevent their future uploads in accordance with Article 17(4)(b). Pursuant to Article 17 (8), the application of Article 17 should not lead to any general monitoring obligation.

Possible elements for the guidance:

The guidance should give indications to Member States on how they should implement Article 17(4)(c) in

their national laws. Member States should bear in mind that the two conditions set in letter (c) are subject to the principle of proportionality provided for in Article 17(5). The ‘best efforts’ that service providers should make to prevent future uploads of notified works should be approached in the same way as in relation to Article 17(4)(b). The guidance should recall the importance of assessing whether the best efforts have been made by service providers on a case-by-case basis.

Member States should also bear in mind that the application of Article 17 should not lead to any general monitoring obligation and that legitimate uses have to be safeguarded as provided for in paragraphs 7 and 9, and as further explained in section IV. This is particularly relevant for the application of the second part of letter (c), according to which service providers have to make their best efforts to prevent future uploads of notified works.

The guidance should also indicate that when implementing Article 17(4) letter (c), Member States need to clearly differentiate the type of information rightholders provide in a ‘sufficiently substantiated notice’ for the removal of content (the ‘take-down’ part of letter (c)) from the “relevant and necessary information” they provide for the purposes of preventing future uploads of notified works (the ‘stay-down’ part of letter (c), which refers back to letter b).

With regard to the elements to be included in a ‘sufficiently substantiated notice’ submitted by rightholders, the guidance should recommend Member States to follow in their implementation the Commission Recommendation on Measures to Effectively Tackle Illegal Content Online^[1]. The information provided should be specific and detailed in nature in a way in which it verifies not only the work or protected subject matter and the specific rights held by the rightholder but where it is alleged to be on the website in question. Points 6 to 8 of the Recommendation list elements that could be included in the notices. As the Recommendation is a horizontal non-binding instrument and therefore not copyright specific, existing national rules and current practices for copyright notices, which may contain more details, could also be applied.

Article 17(4) letter (c) second part (the ‘stay down’ obligation) refers back to letter (b) of the same paragraph. As a consequence, in order for the service providers to be able to deploy their best efforts to avoid future uploads under this provision, rightholders have to provide them with the same type of ‘relevant and necessary’ information which is relevant for the application of letter (b). This means for example that, if a service provider uses fingerprinting technologies to avoid future uploads of notified works, receiving as information only the title of a song and its location, as identified in a notice, would be insufficient. In this case, to allow service providers to avoid future uploads of notified works, rightholders would need to provide the services with fingerprints or content files. If rightholders have already provided the ‘necessary and relevant’ information under letter (b) of Article 17(4) with regard to a specific notified work, they should not be obliged to re-submit the same information for the purposes of ‘stay-down’, but this should be assessed on a case-by-case basis.

[1] See Commission Communication of 1 March 2018 available at: <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>

Question 10: What information do you consider a sufficiently substantiated notice should contain in order to allow the online content-sharing service providers to act expeditiously to disable access /remove the notified content?

2600 character(s) maximum

Identification of the rightholder, title of the work, and its date of production, with the request to take appropriate action should be sufficient. In case of serial production such as a tv series, it should be enough for the rightholders to report to the OCSSPs only once, stating that they do not consent to the entire production appearing on the provider's website.

Please note that OCSSPs often require information which is too detailed (e.g. all URL addresses for the same infringing content). In this way conditions imposed on rightholders are difficult to meet and too time-consuming, which result in t illegal content being available longer to the detriment of rightholders.

That is why the concept where online platforms introduce mechanisms to facilitate a privileged channel for "trusted flaggers" (i.e. specialised entities with specific expertise in identifying illegal content and dedicated structures for detecting and identifying such content online) is worth considering. In order to ensure faster removal of illegal content notices from such trusted flaggers, their notices should be fast-tracked or at least prioritized by the OCSSPs. In this context, the YouTube Trusted Flagger program is a good example of such mechanism.

Question 11: Are there any other elements related to the 'notice and take down' and 'notice and stay-down' systems provided for in Article 17(4)(c) that should be covered by the guidance? If yes, please explain which ones and how you would suggest the guidance to address them.

2600 character(s) maximum

Each OCSSPs should be obliged to have its own functioning email address/contact form dedicated to reporting copyright infringements and react immediately 24 hours a day.

The OCSSP who needs additional information/data in order to perform his "stay down" obligations (e.g. content files) should precisely describe the scope of information needed for the purposes of preventing future uploads of notified works. If such information is not public, it should be given in response to a rightholder's notification.

4. SPECIFIC LIABILITY REGIME FOR START-UPS (ARTICLE 17.6)

Background

Article 17(6) provides for a specific liability regime for 'new' companies, with lighter conditions. This is in practice a two-tier regime applicable to services, which have been active in the EU for less than 3 years and have an annual turnover of less than 10 million euros with different rules applying to them depending on the audience they attract. In practice:

(i) If those 'new' services have less than 5 million unique visitors they are required to make their best efforts to obtain an authorisation (Art. 17 (4) (a)) and they have to comply with the 'notice and take down' obligation under Art. 17(4) (c), first part.

(ii) If those 'new' services have more than 5 million unique visitors they are subject to the same obligations of best efforts to obtain an authorisation and 'notice and take down' as services with a smaller audience but in addition, they also need to comply with the obligation to avoid future uploads of notified works under Article 17 (4) (c) second part ('stay down' obligation).

For both categories of services, the condition of best efforts to ensure the unavailability of unauthorised content, provided for in Article 17 (4)(b), is not applicable.

Possible elements for the guidance:

The guidance should provide indications to the Member States for the implementation of the specific liability regime set out in Article 17(6). It could focus on certain elements of the liability regime, which may raise practical questions, such as how to calculate the annual turnover of the services and the number of monthly unique visitors. It would remind for example that the annual turnover needs to be calculated in accordance with the Commission Recommendation 2003/361/EC for SMEs. It would also explain that the number of monthly unique visitors refers to visitors across the Union, as explained in recital 66, and not per Member State.

The guidance should also clarify that the principle of proportionality provided for in Article 17(5) and the safeguards for legitimate uses under Article 17(7) apply to the liability regime for ‘new’ services. In this context, the guidance could provide some examples of what best efforts could be expected from the ‘new’ services covered by Article 17(6) for obtaining authorisations and where applicable, for preventing future uploads of notified works, in the light of the principle of proportionality.

Question 12: What specific elements of the specific liability regime for “new” services, provided for in Article 17(6), should in your opinion be addressed in the guidance and how?

2600 character(s) maximum

Criteria for “new” services need further clarification. The guidance should take into consideration issues involving legal succession and factual continuation of the services. Also, the burden of proof relating to the duration of the platform’s activity in the EU, its turnover, as well as the number of unique users, should rest with the OCSSP invoking the circumstance of being a “new” service.

IV. SAFEGUARDS FOR LEGITIMATE USES OF CONTENT (Art. 17(7)) and REDRESS MECHANISM FOR USERS (Art. 17(9))

Background

Article 17(7) and 17(9) lay down rules aiming to ensure that any action undertaken together by service providers and rightholders does not lead to the unavailability of content which does not infringe copyright. This is of particular importance (but not only) for the application of Article 17(4) letter (b) and second half of letter (c), whereby online content-sharing service providers need to make their best efforts to ensure the unavailability of unauthorised content and to prevent future uploads of notified works. Article 17(7) also provides that the Member States must ensure that users in each Member State are able to rely on the existing exceptions or limitations for quotation, criticism, review and use for the purpose of caricature, parody or pastiche when they upload and make available their content on online content-sharing service providers’ websites. Under Article 5 of Directive 2001/29/EC these exceptions were optional and therefore not all Member States have implemented them. Article 17 (7) makes these exceptions mandatory for all Member States for the uses of copyright protected content covered by this provision.

Article 17(9) requires online content-sharing service providers to put in place a redress mechanism allowing

users to challenge the blocking or removal of their content. Disputes can occur when content-sharing service providers disable or remove access to user uploaded content, whereas users consider their uploads legitimate, for example uses of third party content under an exception or limitation to copyright.

Article 17(9) further requires that the Directive shall in no way affect legitimate uses, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679. It also requires online content-sharing service providers to inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

Possible elements for the guidance:

The guidance should explain what Member States have to do to implement Article 17(7) and the relationship between that provision and Article 17(4). Article 17(7) is addressed to safeguarding any content uploaded by users that does not infringe copyright or related rights including by virtue of the application of any exception or limitation. Such non-infringing use is often referred to as 'legitimate use'. In addition, Article 17(7) second paragraph introduces certain mandatory exceptions for users that upload content online.

Member States should be recommended to explicitly transpose in their law the text of Article 17(7) first paragraph whereby the cooperation between online content-sharing service providers and rightholders, in particular under Article 17(4), must not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States are required to transpose in their national laws the mandatory exceptions in Article 17(7) second paragraph covering the case of content uploaded by users on online content-sharing services for:

- (a) quotation, criticism, review
- (b) use for the purpose of caricature, parody or pastiche

Whilst the exceptions or limitations in Directive 2001/29/EC are optional in nature and addressed to any user, Article 17(7) applies to all users in all Member States who must be able to rely on these exceptions or limitations when they upload content on online content-sharing service providers' websites. Recital 70 explains that allowing users to upload and make available content generated by them for the purposes of the exceptions or limitations in Article 17(7) is particularly important for 'striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property'.

- (i) Legitimate uses under Article 17(7)

Examples of legitimate uses may include (1) uses under exceptions and limitations, (2) uses by those who hold or have cleared the rights in the content they upload or covered by the authorisation under Article 17 (2); (3) uses of content not covered by copyright or related rights, notably works in the public domain or for example content where the threshold of originality is not met.

The guidance could recall that uses under exceptions and limitations cover the upload and making available of content under the mandatory exceptions in Article 17(7) but also under other – optional - exceptions that Member States may have implemented under Article 5 of Directive 2001/29/EC. Some of those are particularly relevant for uses on online content-sharing services and Member States, which have not done so, could be recommended to implement them for uses covered by Article 17 (for ex. incidental use)[1].

Member States that may have already implemented the exceptions made mandatory by Article 17(7) under Directive 2001/29/EC should review their legislation to make sure it complies with Article 17(7) and if needed, adapt it accordingly. Member States whose laws do not provide for these exceptions will have to transpose them as a minimum for the uses covered by Article 17.

The guidance should give indications to the Member States on the interpretation of the mandatory exceptions, in line with the case law of the Court of Justice of the European Union.

(ii) Practical application of Article 17(4) in compliance with Article 17(7)

The guidance should also give indications to the Member States as to how they can direct online content-sharing service providers and rightholders to apply in practice Article 17(4) in compliance with Article 17(7). The objective should be to ensure that legitimate content is not blocked when technologies are applied by online content-sharing service providers under Article 17(4) letter (b) and the second part of letter (c).

The guidance should explain that the balancing sought by the Directive requires, besides the effective complaint and redress mechanism discussed in the subsequent section, that the cooperation between service providers and rightholders does not result in blocking legitimate uses. Therefore, the guidance would take as a premise that it is not enough for the transposition and application of Article 17 (7) to only restore legitimate content ex post, once it has been blocked. When service providers apply automated content recognition technologies under Article 17(4), on the basis of the relevant and necessary information provided by the rightholders, legitimate uses should also be considered at the upload of content.

It should be born in mind that in the current state of the art, content recognition technology cannot assess whether the uploaded content is infringing or covered by a legitimate use. However, technology may assist service providers to distinguish uploads likely to be infringing for the purposes of Article 17(4) from uploads likely to be legitimate, based on the application of technical parameters as explained below. In order to ensure compliance with Article 17(7) in practice, automated blocking of content identified by the rightholders should be limited to likely infringing uploads, whereas content, which is likely to be legitimate, should not be subjected to automated blocking and should be available.

This distinction between likely infringing and likely legitimate uploads would not introduce any new legal concepts, nor would it imply a final legal assessment as to whether an upload is legitimate or not, but it would be a reasonable and practical way for service providers to apply Article 17(4) in line with Article 17(7) when they use content recognition technology. This mechanism should also not prevent the possible use of technology for reporting and remunerating the use of authorised content under contractual terms agreed by rightholders and service providers.

Under this approach, when uploads match with the relevant and necessary information provided to them by the rightholders, service providers should assess their legitimacy in compliance with Article 17(7) and

proceed, where applicable, to block likely infringing uploads. In such a case users should still be able to contest the blocking under the redress mechanism provided for in Article 17(9), which requires human review for the contested content before a decision is taken whether it should stay down or be restored.

In cases when it is not possible for online content-sharing service providers to determine on a reasonable basis whether an upload is likely to be infringing and the service providers use content recognition technology, the service providers should notify the user that (part of) the upload matches with the information (e.g. fingerprint) provided by the rightholders. If the user contests the infringing nature of its upload, service providers should submit the upload to human review for a rapid decision as to whether the content should be blocked or be available. Such content should remain online during the human review. If rightholders disagree with the decision of service providers to keep the content up, they would be able to submit a notice in compliance with Article 17(4) letter (c) to ask for the removal of the content that they consider infringing. If, on the other hand, upon being notified by the service provider, the user does not contest the infringing nature of the upload, the content could be blocked without further review, without prejudice to users' ability to rely on other available redress, including judicial review.

The human review process should be swift and allow both rightholders and users to provide their views. If, as a result of the human review, the service provider decides to disable or remove the uploaded content, it should inform the user of the outcome of the review; and the user should be able to have recourse to the out-of-court dispute resolution mechanism, provided for in Article 17(9).

The distinction between likely infringing and likely legitimate uploads could be carried out by service providers in cooperation with rightholders based on a number of technical characteristics of the upload, as appropriate. Relevant technical parameters could be, among others, the level of match with the reference file provided by rightholders for the purposes of Article 17(4), the length/size of third party content used in the upload and whether it is surrounded by user's own content. For example, in application of such technical parameters, the upload of a video of 30 minutes, where 29 minutes are an exact match to a reference file provided by a rightholder, could likely be considered an infringing one, unless it is in the public domain or the use has been authorised. On the other hand, a user generated video composed by very short extracts, such as one or two minutes of different scenes from third party films, accompanied by additional content such as comments added by the user for the purpose of reviewing these scenes could be more likely to be legitimate because potentially covered by an exception such as the quotation exception. Similarly still images uploaded by users which match only partially the fingerprints of a professional picture could be legitimate uploads under the parody exception, as they could be 'memes', i.e. new images created by users by adding elements to an original picture to create a humoristic or parodic effect.

The application of technical parameters should not be arbitrary and should be without prejudice to any legal decision on the nature of the content uploaded, i.e. whether it is an infringement of copyright or a related right or not.

Member States should remain free to introduce specific measures to discourage the abuse of this mechanism by users or rightholders.

Finally, in order to minimise the risk that authorised content uploaded with the authorisation of rightholders is blocked, Member States may consider recommending service providers to use the practice of 'whitelisting', which allows rightholders to indicate to the service providers users and uses that they have authorised. For example, in case of co-productions or partnerships, broadcasters can indicate to service

providers which other broadcasters or partners are authorised to upload their content. Such uses would not require the application by service providers of content recognition technologies for blocking purposes.

(iii) Complaint and redress mechanism under Article 17(9)

Article 17(9) requires Member States to provide for a complaint and redress mechanism that online content-sharing service providers have to make available to users in the event of dispute over the blocking or removal of their content; it also requires Member States to ensure that out-of-court redress mechanisms are available for the settlement of these disputes. When approaching Article 17(9) Member States should bear in mind that the obligation on service providers to put in place a complaint and redress mechanism should be implemented in line with the Union law rules on freedom to provide services, including the 'country of origin' principle provided for in Article 3 of Directive 2000/31/EC on e-commerce, when applicable.

The guidance should give indications to the Member States on how they could instruct service providers to apply the complaint and redress mechanism in practice. It could suggest that when content is blocked as a result of the application of the mechanism described above for the practical application of Article 17(4) in compliance with Article 17(7), the contested content, which is likely infringing should stay down pending the human review required under the redress mechanism. This would correspond to the approach that only uploads likely to be infringing could be automatically blocked under Article 17(4) in compliance with Article 17(7) and Article 17(9). Content that service providers remove ex post under the notice and take down procedure under Article 17(4) letter (c) should only stay down pending the redress, provided that the notice submitted by rightholders is a 'sufficiently substantiated' notice.

In line with the requirement of Article 17(9) that the complaints by users be processed without undue delay, the guidance should suggest that as a rule service providers and rightholders must react to complaints from users within a reasonably short timeframe to ensure that the mechanism is expeditious. If rightholders do not react in a reasonable timeframe, content which has been blocked or taken down should become available or be restored. The guidance should also recall rightholders' obligation to duly justify their requests to have content uploaded by users blocked or removed and encourage rightholders to provide this justification in clear and simple terms to make it understandable to an average internet user.

If the final decision by service providers is to keep the content unavailable, users must be able to contest this decision through the impartial out-of-court dispute settlement mechanism, which Member States have to make available. The guidance should indicate that the out-of-court dispute settlement mechanism can be an existing one but with relevant expertise to handle copyright disputes. It should also be easy to use and with no cost for users.

The guidance should also indicate to the Member States that they need to implement in their law the obligation on online content-sharing service providers to inform their users in their terms and conditions that users can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

The guidance could also recommend how service providers can increase users' awareness of what may constitute legitimate uses, as required by Article 17(9). For example, Member States could encourage the service providers to put in place standard forms for users to contest the blocking or removal of their content. This could also be accompanied by information aiming to foster users' awareness of copyright concepts and to encourage a responsible behaviour when uploading content online.

Finally, the guidance should underline that any processing of personal data and identification of users that may be required in the context of the application of Article 17 needs to be done in compliance Directive 2002/51/EC on e-privacy and Regulation 2016/679 on general data protection. Member States should monitor the correct application of these rules.

[1] Article 5.3 (h) of Directive 2001/29/EC

Question 13: Do you have additional suggestions to implement Article 17(7) to ensure a fair balance between different fundamental rights notably between copyright and freedom of expression? Would you agree with the approach presented above or do you consider other solutions could be used?

2600 character(s) maximum

Consideration should be given to the solution when the user contests the infringing nature of his upload and service providers submit upload in question to a human review for a rapid decision as to whether the pending content should be blocked or be published. Such content should remain blocked also during the human review. Otherwise rightholder's situation still will be inferior to pirate websites, where their rights are often being violated on a massive scale.

Question 14: Do you have additional suggestions on how the guidance should address the implementation of the complaint and redress mechanism and of the out-of-court dispute settlement under Article 17(9)?

2600 character(s) maximum

The use of the practice of "whitelisting" should be considered in order to minimise the risk that authorised content uploaded with the authorisation of rightholders will be blocked.

Question 15: Are there other elements than those outlined above that should be addressed for the concrete implementation of Article 17(7) and (9)? If yes, please explain which ones and how the guidance should address them.

2600 character(s) maximum

V. INFORMATION TO Rightholders (Art. 17(8))

Background

Under Article 17(8), online content-sharing service providers need to provide rightholders, at their request, with information on the functioning of the tools used for ensuring the unavailability of content. Where they conclude licensing agreements with rightholders, the service providers also need to provide them with information on the use of their content, without however having to provide rightholders with detailed and individualised information for each work or other subject matter identified (recital 68).

Possible elements for the guidance

The guidance should recall the different elements set out in Article 17(8) and explain in particular how Member States should direct the parties to apply this provision in practice. It should give indications as to the information that service providers should provide to rightholders, if requested, to comply with it. For example, information on content recognition tools deployed by service providers to avoid unauthorised content could include descriptions on the efficiency of these tools, the general parameters used for their deployment, as well as any changes made overtime to the operation of these tools. As regards information on the use of content covered by the agreements concluded between service providers and rightholders, the guidance should recall that service providers are not required to provide detailed and individualised information on each work, and encourage the development of standardised reporting through voluntary cooperation between stakeholders. Some more specific requirements on reporting exist already under Article 17 of Directive 2014/26/EU and govern the relationship between users and CMOs.

In line with the Commission Recommendation on illegal content online, in order to ensure a high level of transparency to users, the guidance could recommend that Member States encourage online content-sharing service providers to publicly report on the functioning of their practices with regard to Article 17(4).

Question 16: What are the most important elements that the guidance should cover in relation to the information that online content-sharing service providers should provide to rightholders on the functioning of their tools to ensure the unavailability of unauthorised content and on the use of rightholders' content under Article 17(8)? Please provide examples of particular information that you would consider as covered by this obligation.

2600 character(s) maximum

In particular, OCSSPs should provide:

- a) detailed information about technologies deployed to detect unauthorized content, including all information/data needed from the rightholders for the purposes of preventing future uploads of notified works,
- b) when service providers rely on technological tools such as content recognition technologies developed in-house – details about security measures applied to protect reference files, accompanied by provisions restricting the usage of those files,
- c) when service providers buy solutions/technologies from third parties/ technology providers - information on the entity providing such technology and details about security measures applied to protect reference files, accompanied by provisions restricting the usage of those files,
- d) notification on actions undertaken to remove unauthorised content.

Question 17: Are there any other elements beyond the ones listed above which should be covered by the guidance? If yes, please explain which ones and how you would suggest the guidance to address them.

2600 character(s) maximum

Member States could be encouraged to designate a competent authority to monitor content recognition technologies used by OCSSPs and transparency of algorithms being used (whether they work in the same way for all users).

VI. OTHER TOPICS

Question 18: Do you think the guidance should address any other topic related to Article 17? If yes, please indicate which topics you consider should be included in the guidance and how you consider the guidance should address them.

2600 character(s) maximum

It should be recognized that fighting intellectual property crimes in Europe is a priority for Member States, considering the very negative economic and social impact of such crimes. Thus, the guidance should highlight that the liability exemption mechanism provided for in Article 17 should not apply to service providers whose main purpose is to engage in or to facilitate copyright piracy, as indicated in Recital 63.

On the other hand, sites which engage in or facilitate piracy are often established in jurisdictions outside the EU in the attempt to escape laws and regulations that protect rightholders, or to take advantage of weaker enforcement practices. That is why we would like to point out the importance of ensuring implementation and application of the existing EU copyright acquis in an appropriate manner. This means that the DSM Directive is implemented in a manner which ensures its intended goals of providing a high level of protection of intellectual property. However, implementation of Article 17 alone is not enough. This also concerns Article 8.3 of the InfoSoc Directive, which has not been properly implemented in some countries (e.g. Poland).

FINAL REMARKS

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