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

Response of the European Composer and Songwriter Alliance (ECSA)

I. SCOPE OF THE SERVICES COVERED BY ARTICLE 17

Question for the targeted stakeholders' consultation:

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.*

In general, ECSA takes the view that the definition of OCSSPs should be interpreted in a broad manner in order to ensure that it covers all relevant OCSSPs which have an impact on the distribution of creative works.

Secondly, we consider that services which are structurally infringing authors rights/copyright as well as services who facilitate access to pirated content should clearly be excluded from Article 2 (6) since they should not be able to benefit from the mitigation measures provided by Article 17 (4). In addition, the European Commission should interpret "cloud services that allow users to upload content for their own use" in a restrictive manner since those services can often allow users, not only "to upload content for their own use", but also to share such content. In line with the Directive, we consider that those services should not be excluded since they are used to "share" content.

Thirdly, while recitals 62 and 63 describe the EU's legislator justification for Article 17, they are not intended to be included in the definition of an online content-sharing service provider (OCSSP) and should not be used to narrow the scope of Article 2 (6). For example, the reference to the competition for the same audience should be understood in a broad manner in the sense that OCSSPs indeed compete with a myriad of other online audio and video streaming services, regardless of their specific business models (subscription based or not). Another interpretation could have harmful consequences for the fair remuneration of music authors.

Finally, we observe that AI powered algorithms and automated recommendation tools are essential for OCSSPS when they "organise and promote" copyright works on their platforms.

As a result, we consider that the guidance could helpfully clarify that the use of automated means does not exclude those services from the scope of Article 2 (6).

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

Questions for the targeted stakeholders' consultation:

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.*

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?*

We take the view that Article 17 does not create any "sui generis right" or "special right" since Article 17 (1 and 2) as well as recital 64 provide a mere clarification that remains linked to the EU Copyright *acquis communautaire,* in particular to Article 3 of the 2001 "Infosoc" Directive. This view is also consistent with recital 4, which provides that the 2019 Directive is "based on and complements the rules laid down in other directives currently in force in this area, in particular Directive 2001/29/EC on copyright in the information society". As a result, the communication to the public act referred to in Article 17 is a communication to the public act as provided by Article 3 of the 2001 "Infosoc" Directive. Consequently, in contrast with the consultation document, we believe that EU Member States should implement Article 17 and its regime governing authorisations in a manner which is consistent with Article 3 of the 2001 "Infosoc" Directive, and its implementation at national level.

We also consider that the guidelines as well as the various national implementations of Article 17 should clearly state that Article 14 of the e-commerce Directive no longer applies to OCSSPs. Otherwise, we support the EC consultation document when its suggests that "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" since a variety of different factors should be used to this end. In addition, the guidelines should make clear that the authorisations requested by OCSSPs should also include the relevant reproduction rights, since OCSSPs host and store copyright works.

In addition, we would like to express caution against about an extensive interpretation of both Article 17.2 and recital 69, which would go beyond the wording of the Directive and be contrary to the general objective of Article 17:

- Article 17.2 provides that "Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues". It is important to note that the exception to the general rule applies to both users which "are not acting on a commercial basis ***or*** where their activity does not generate significant revenues", contrary to what is stated in the consultation document, which wrongfully suggests that those conditions are cumulative ("and" instead of "or").

- In addition, recital 69 provides that "where rightholders have ***explicitly*** authorised users to upload and make available works or other subject matter on an online content-sharing service, the act of communication to the public of the service provider is authorised within the scope of the authorisation granted by the rightholder" and further states that "there should be ***no presumption*** in favour of online content-sharing service providers that their users have cleared all relevant rights". In line with this recital, we believe that the guidelines should make clear that only an express authorisation can cover those cases, in order to avoid that OCCSP will transfer their own responsibilities to users.

Finally, as ECSA defends and promotes the collective management of authors' rights, we consider that ECL schemes can be useful, in line with the conditions set out in Article 12 of the 2019 Copyright Directive, to develop licensing solutions that enable a fair and proportionate remuneration for authors.

III. THE SPECIFIC LIABILITY REGIME UNDER ARTICLE 17

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

Questions for the targeted stakeholders' consultation:

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.

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?

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.

First of all, we welcome the fact that the consultation document clearly states that service providers have to engage proactively with rightholders – 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 – in order to seek an authorisation.

In the music sector, it is clear that CMOs have a mandate to act on behalf of most music authors and should be contacted by OCSSPs which seek an authorisation. Contractual practices with CMOs exist for a very long time and should not pose any particular issue as long as OCSSPs provide, in good faith, reliable and precise information on the exploitation of the works, on the revenues generated and on the functioning of the service.

In that respect, we note that CMOs can offer licences adapted to each OCSSPs, taking into account its revenues, needs or size. As a result, we recall that Article 17 (1) clearly states that the obligation to get a licence applies to all OCSSPs, regardless of their size. We therefore believe that the guidance should not make a difference between small and large OCSSPs.

As a consequence, and taking into consideration that CMOs have an obligation to publish their tariffs and model contracts, we consider that the guidelines should make clear that an OCSSPs which would refuse to pay those tariffs would not comply with the best efforts obligation, triggering their liability.

In addition, we also note that a high level of transparency for the exploitation of copyright works is also required by Article 19 of the Copyright Directive – which forms the cornerstone of the entire Title IV, Chapter 3 of the Copyright Directive (Articles 18-23 / Fair remuneration in exploitation contracts of authors and performers). Without strong transparency requirements for both the implementation of Article 17 and Articles 18 to 23, there will be no fair nor proportionate remuneration for authors, despite the objectives of the Directive.

2. 'BEST EFFORTS' TO ENSURE UNAVAILABILITY OF SPECIFIC PROTECTED CONTENT (Art. 17(4)(b))

Questions for the targeted stakeholders' consultation:

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.

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)?

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.

We take the general view the OCSSP has not made its best efforts to ensure unavailability of the protected content when the content is made available without an authorisation from the rightholder, The notion of high industry standards should take into account the fact that there are evolving and effective technologies available, that are made more and more affordable to all OCSSPs.

3. 'NOTICE AND TAKE DOWN' AND 'NOTICE AND STAY DOWN' (ART. 17(4)(c))

Questions for the targeted stakeholders' consultation:

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?

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.

For the effective functioning of Article 17.4 (b) and c), we consider that the guidelines should require the cooperation between rightholders and OCSSPs, rather than merely encouraging it.

OCSSPs should be required to gather all necessary information, use all relevant means, and deploy state of the art technologies and appropriate tools to fulfil their duties. For musical works, they should use technologies that properly identify the different uses of musical works.

The forthcoming guidance should not create new and further obligations for rightholders as regards the format of the information to be provided to OCSSPs for the exercise of Art 17.4(b) and (c). In addition, rightholders or relevant CMOs should not be required to transmit information which go beyond the remit of their rights.

Finally, we also believe that the guidelines could usefully clarify that i) the prohibition of any general monitoring obligation does not apply when the content is identified ii) that the non-compliance with Article 17 (4) c) leads to an infringement of copyright and therefore triggers the liability of the OCSSPs.

4. SPECIFIC LIABILITY REGIME FOR NEW SERVICE PROVIDERS (ARTICLE 17.6)

Question for the targeted stakeholders' consultation:

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?

First of all, we recall that Article 1(6) does not relieve those "new" services from the licensing obligation set out in Article 17 (1). Secondly, we note once again that CMOs have licences adapted to the needs of those "new" OCSSPs.

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

Questions for the targeted stakeholders' consultation:

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?

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)?

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.

As a preliminary comment, we note that the need to ensure "a high level of protection for copyright and related rights" is mentioned in several provisions of both the 2001 Infosoc (recital 4 and 9) and the 2019 Copyright Directives (recital 3), in line with the fact that they are property rights - both economic and moral - protected by the Charter of Fundamental Rights (Article 17) and several international instruments to which the EU and its Member States are bound. This high level of protection must guide the Commission in drafting its forthcoming guidelines.

We also recall that the “three-step test” is also enshrined in international agreements and EU law and should steer the initiatives of the EU and its Member States regarding copyright exceptions. This key test, as included in Article 13 of the TRIPs agreement, provides that "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder”.

Secondly, we recall that the main goal of Article 17 is to find a balance between fostering the availability of creative works through licensing, while rewarding and remunerating creators for the exploitation of those works, notably through collective licensing.

Regarding the specific consultation document, we have the following comments and concerns:

First of all, we believe that the European Commission should recall in its guidance that Member States which will have to implement the exceptions required by Article 17 should consider to provide a compensation scheme, when adopting such exceptions at national level. An exception without compensation to the benefit of commercial operators would not only be unfair to authors but also potentially in breach of the three steps test mentioned above.

Secondly, ECSA has strong reservations regarding the suggestion made by the Commission in the consultation document to suggest an additional exception for “incidental use”, which is not mentioned in Article 17, and goes beyond the competences of the European Commission.

In addition, we note that the concepts of “likely legitimate” or “likely infringing content” are vague, not mentioned in the Directive, and appear to treat “exceptions” as the rule. This distinction is ill-advised as it brings a high level of legal uncertainty by mentioning “a number of technical characteristics of the upload as appropriate” and provides examples, such as the length of the content uploaded, or the level of match with the information provided by the rights holder.

In this respect, we note that the length of a protected work is not in itself sufficient to assess if it can fall under the scope of an exception, as recently confirmed by the Court of Jutice of the European Union in the case C-476/17 - Pelham e.a. Regarding the level of match, we note that Article 17.4 does not limit the scope of the best efforts to ensure unavailability of illegal content only to content that is identical to the content for which right holders have provided information.

Moreover, we are also concerned by the suggestion that the distinction between those new concepts would be assessed by OCSSPs in a discretionary manner, since judicial authorities should remain the sole and only authorities to assess the scope of an exception.

Even more worrying is the fact that the “likely legitimate” upload would be available and only subject to an “ex-post” treatment. Such availability appears to be contrary to the Directive since “ex-post” measures would replace the “ex-ante” measures foreseen in Article 17. In fact, the complaint and redress mechanism should only allow the user to invoke an exception as a defence where a service provider block or removes the content. In that regard, we add that the wording of recital 70 suggests that the content should not be available while subject to the complaint and redress procedure.

Last but not least, ECSA is also alarmed by the fact the consultation document suggests that the Country of Origin principle should apply to the complaint and redress mechanism, in

contradiction with general EU copyright rules, where the principle of the country of destination applies. Since this mechanism is part of the general EU copyright acquis, we consider that there is no valid reason to apply the country of origin principle and that there is a real risk that OCSSPs will seek to establish themselves in certain Member States with the lowest level of ambition and protection for creators and other rightholders.

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

Questions for the targeted stakeholders' consultation:

- 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.

- 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.

Unfortunately, the consultation document on this point appears to suggest that OCSSPs should not be required to provide detailed information in the context of licensing schemes, despite the wording of the Directive, in Article 17 (8) and recital 68. This is a concerning point for music authors, since their fair and proportionate remuneration depends very much on the level of information provided by OCSSPs. Without proper identification of usages by the service as well as accurate and transparent reporting, there is no way to assess the remuneration due to the relevant rightholders. In essence, the suggestions made by the Commission are contrary to the very objective of Article 17 and could defeat its very purpose.

They also seem to run against the transparency obligation provided in Article 19 to the benefit of authors and performers, which provides that "the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive should be of a mandatory nature, and parties should not be able to derogate from those provisions, whether in contracts between authors, performers and their contractual counterparts, or in agreements between those counterparts and third parties, such as non-disclosure agreements".

In addition, we recall that the use of automated content recognition technologies is essential for the efficient licensing of musical works to identify the usage of works and assess how revenues should be distributed to music authors. We would therefore encourage the Commission to change its direction of travel on this point and suggest instead that OCSSPs should duly inform music authors and relevant CMOs with all relevant data on the usages, tools used – including algorithms, and monetization schemes used. Transparency should not be an option if we want to achieve the objectives of Article 17.

VI. OTHER TOPICS

Question for the targeted stakeholders' consultation:

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.

Yes, we would like to emphasize that the vast majority of EU Member States grant authors strong moral rights, providing for an unwaivable right of attribution, as well as a right to object to false attribution, a right to integrity, a right to protection of honor and reputation, as well as a right to withdraw the work from public access. Those moral rights – most often unwaivable – should also be considered in the context of this consultation. In times of fake news, hoaxes, disinformation for entertainment or political purposes, moral rights are more important than ever and should be fully respected, offline and online.

Given their particular nature, moral rights belong to individual authors and can most often be enforced only by them. However, authors generally face many difficulties to enforce those rights, in particular in front of OCSSPs and global platforms to which the very concept of moral rights if often irrelevant or unknown. Certain issues considered in the scope of this consultation (such as exceptions or limitations for quotation, criticism, review and use for the purpose of caricature, parody or pastiche, the concepts of “likely-infringing” or “likely legitimate”, and the general application of Article 17 (4)) can have important and harmful consequences on moral rights and the possibility to exercise and enforce them. We therefore consider that the Commission should take moral rights into account to reach an appropriate balance when drafting the forthcoming guidelines on Article 17.