



SUBMISSION (SUPPLEMENTARY PAPER)

To: European Commission
From: International Federation of Reproduction Rights Organisations (IFRRO)
Re: **Targeted consultation addressed to the participants of the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market – supplementary paper**
Date: 10 September 2020

IFRRO¹ is the international network for national reproduction rights organisations (RROs) - the collective management organisations in the publishing sector - and national and international associations of creators and publishers across the world, with 156 members in more than 85 countries, including most EU Member States.

RROs act on behalf of authors and publishers whenever the individual exercise of their rights is impracticable by giving access to copyright-protected works and enabling the reproduction and certain digital uses of these works. RROs operate in the secondary market and complement the primary market of authors and publishers.

IFRRO's mission is to develop and support an efficient and effective network of collective management organisations around the world, including RROs, to ensure the copyrights of authors, visual artists and publishers are respected when their works are reproduced and used. We do this by advocating for copyright and the creative sector and by building a strong and resilient RRO network that supports the rights of creators and publishers, including economic and moral rights.

One of IFRRO's core values is respect for the rights of individual creators and publishers to determine how their works are managed.

IFRRO welcomes the Commission's consultation on its "initial ideas" for the Article 17 Guidance planned before the end of the year. The Guidance is of great relevance to IFRRO and its members, as authors', visual artists' and publishers' works represent a significant component of the content uploaded onto platforms operated by OCSSPs.

IFRRO's submission is focused on the perspective of its RRO members. However, we strongly support the perspectives from national and international stakeholder groups of authors, visual artists and publishers. Many of our creator and publisher members were also involved in the dialogue and we support their separate responses.

IFRRO has responded to the individual questions in the Commission's targeted online survey. We have also prepared this paper to comment further on some of the aspects of the consultation document that are not specifically raised by the questions. We consider it would be useful to first explain collective management in the text and image sector and the possible role for RROs in the context of Article 17.

¹ International Federation of Reproduction Rights Organisations (www.ifrro.org); Identification number in the EU Transparency Register: 860729437196-92



Background:

- **Collective licensing and the role of RROs in the context of Art. 17**

In 2018, RROs collected and distributed about €1 billion euros to rightsholders. RROs derive their authority from agreements with rightsholders and / or national legislation. Different licensing models are used across the EU, including voluntary collective licensing, voluntary licensing with legislative support, and legal licences. RROs are able to license the rights of members that have given the RRO a mandate to act on their behalf.

By mandating RROs to manage their copyright for (secondary) uses of their content, authors and publishers are remunerated for their work and investment, which in turn enables them to bring new works to the market. The mandates the rightholders give to RROs are different from those in the primary market covered in contracts between authors and publishers.

IFRRO's RRO members have a unique role in providing collective licences that meet the needs of rightsholders and users. In the context of Article 17, RROs may well be able to create new licensing opportunities for rightsholders, in the situation where rightsholders give them a mandate to act of their behalf.

While we are not aware of any RRO member as yet licensing user uploaded content, the feedback we have received so far from members suggests that:

- new technological solutions are being developed to help enable RROs to offer new licensing solutions for user uploads in the future, and
- there are licensing tools which currently exist that it is considered could be adapted or repurposed to allow RROs to offer licences in the future.

- **Recognition of IFRRO rightholder member concerns**

IFRRO's creator and publisher organisations have raised their specific concerns regarding the implementation of Article 17 during the Stakeholder Dialogue. Awareness of the different business models in different sectors, which shape the different stakeholders' perspectives, is very important in developing the Art. 17 Guidance.

It is clear from the feedback of IFRRO's creator and publisher members that while licensing is a focus for some, the enforcement mechanism is more of a focus for others.

No author or publisher wants their primary sales market to be undermined. If they decide that they do not want their content to appear on an upload platform, then they want to be sure this will be prevented. If it does happen, then they want to be able to get a quick take-down and stay-down.

It is essential that rightsholders can trust in OCSSPs' full cooperation, as envisaged under Art. 17 (4). Agreeing on "best practices" is key to Art. 17 being effective for the various rightsholders concerned.

Feedback on the Commission's Article 17 Guidance consultation paper

IFRRO's submission explains the perspective of its RRO members. It also complements the individual feedback provided by various IFRRO members involved in the Art. 17 Stakeholder Dialogue. We would ask the Commission to take into account the following points (corresponding to the numbering used in the Commission's consultation document) together with our responses to the online targeted survey.

II. AUTHORISATION: ART 17 (1-2)

i) Authorisation models

- We agree that flexibility is needed regarding the approach to authorisation models, insofar as the need to take into account the specificities and practices of different sectors. This includes having the possibility of **both individual and collective licensing** solutions.
- We are **concerned however about the impact of the Commission's interpretation of Art. 17 as being "*lex specialis*".** To our understanding and as indicated under recital 64, Art. 17 rather clarifies the application of the existing communication to the public right under Art. 3 InfoSoc Directive to OCSSPs (as defined in Article 2(6) of the Copyright DSM Directive) in line with the existing EU and international copyright law.
- The Commission's approach in its consultation paper has **worrying implications and creates uncertainty**. Our understanding is that the exploitation level under Art. 17 is the same as, inter alia, Article 3 of the InfoSoc Directive. The 'special' aspect is rather the **liability level**. So, in this sense, any freedom of Member States beyond what both Art. 17 and Article 5 (InfoSoc) allow cannot be contemplated.
- It is particularly **important that the Guidelines do not create uncertainty in relation to the application of exceptions** (see IV i) concerning legitimate uses below).

ii) Authorisations covering users

- Concerns have been raised in relation to e.g., how "**non- significant**" revenues might be interpreted and calculated. It is vital that rightholders do not lose out on legitimate revenues for uses of their works, no matter how insignificant or "in the public interest" others may consider them to be. It is important the Guidance takes this into account.
- Similarly, it is important that the Guidance also takes into account issues that might arise when defining "**non-commercial purposes**" and whether this is determined by structure or purpose. For example, if an organisation has a non-commercial structure but charges commercial fees would the activity be considered "non-commercial"? There is a need for clarity, as a broad interpretation of the term could result in unintended consequences such as all activities by universities being excluded.

- There is also the concern that where rightholders have already authorised users to upload content, the **specific conditions / limits must be fully respected** and do not go beyond the scope of what was agreed. Exchanges concerning **the different types of rightholders and works affected** would be important in establishing what is the most suitable approach.

On the question of **how to ensure a smooth exchange of information between rightholders, OCSSPs and users on authorisations that have been granted**, it is important to recognise that this is an area that is changing and evolving. For example, in the text and image sector there are systems being developed that enable automatic and immediate identification of works uploaded onto platforms by individuals. In this situation, if a platform has a licence it can be easily verified whether the work is included in that licence or not, and if not, the system detects that the work is copyright protected and immediately blocks access to the work.

"Hashes" and the metadata enable easy identification of the work, without rightholders having to provide a copy of their works to those responsible for the platforms. Another advantage is that this approach can be used across different systems encompassing different types of content (e.g., newspapers, sheet music...).

In the field of graphic and visual arts, ADAGP, the French royalty collecting and distribution society, has taken the lead on an international project called "AIR" (automatic image recognition) - see <https://www.adagp.fr/en/actuality/join-air-project>. This uses digital fingerprinting technology, capable of recognising, extracting and filtering mass data from searched images, which should ultimately transform detection capabilities with regard to image utilisation and the procedures for allocating rights to each image.

It is important for the Guidance to recognise that the systems for enabling the identification of works are evolving and that the systems adopted should encourage and support that development.

III. SPECIFIC LIABILITY REGIME UNDER ARTICLE 17

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

It is a concern when reading the consultation document that there is misstatement of the relationship between the "principle of proportionality" and the "best efforts" standards that must be met by OCSSPs when seeking authorisations under Article 17(4)(a) (as well as when taking steps to prevent and remove unauthorised content under 17(4) (b) and (c)). It is important that the fundamentals of the Directive are not "rewritten" in the Guidance and that the balance achieved following the long legislative process is not jeopardized.

The objective of the Directive is to achieve a well-functioning and fair marketplace for copyright, to further stimulate innovation, creativity, investment and production of new content. The Guidance must ensure that the standards enshrined in the Directive are fully respected and avoid a dilution of "best efforts", which would be contrary to the objective standards set out in the Directive. For example:

- In terms of what might be considered “best efforts”, the proposal 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*” is a concern. There is the risk that if the OCSSPs unilaterally assess what are “best” efforts and there are no objective standards, that many rightholders will never be contacted for authorisation.
- The Commission also discusses “*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)*”, specifying that “*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.***” While applying the best efforts obligation on a case-by-case basis is acceptable, the Commission’s approach has raised questions about how the proportionality principle is applied and concerns that applying so-called “reasonable standards” could in effect dilute best efforts.
- We welcome the suggestion that “*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.***”

However, again it is a concern that this is diluted by the proposal that “*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)*”.

It is important that the Guidance reinforces, as the Commission does, that rightholders should receive appropriate remuneration for use of their works (recital 61), and that “***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, there is concern about the potential difficulties arising where service providers dismiss licensing offers that are not on **fair terms...** including as regards the **remuneration to be paid.***” This situation is particularly concerning as a result of the market dominance of some service providers. We are therefore of the view that it must not be left to the OCSSP to decide what “fair” terms are.

While best efforts obligations should be considered on a case-by-case basis, it is important that negotiations are genuine and that OCSSPs can demonstrate this.

We understand that in Spain, for example, in order to demonstrate that the provider genuinely wants to reach an agreement and obtain an authorisation, a ‘payment on account’ triggers the existence of a provisional authorisation for the use of works during the negotiation period, allowing the platform to continue its activity while ensuring that rightholders are remunerated for uses of their work via these platforms. This ensures that even if a licence is not finally agreed, there is legal certainty as well as more a “balanced” environment.



We welcome the suggested reference 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).*” Consistency is important.

It is also good to clarify, as suggested that “*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.*” We particularly support Member States taking measures “*to facilitate the grant of authorisations, for example with regard to licensing models...*”.

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

Our main concern regarding best efforts to ensure the unavailability of specific works for which rightholders have provided the service providers with the relevant and necessary information, again relates to the risk of applying guidance that has the effect of diluting the best efforts obligations.

We are concerned about the Guidance being too prescriptive. In particular, we have concerns about the emphasis on effort being related largely to content “prevailing in their website”. There must also be an effort in relation to less popular content that will still be damaging to the rightholder.

We believe that technical solutions – which continue to evolve and improve - are also important and AI, for example will have a big impact on the reliability of those tools.

Engaging with rightholders and using the technology available (see examples mentioned above) would help demonstrate that an OCSSP is making its best effort to ensure the unavailability of copyright protected material for which a licence has not been agreed. This technology could also be used to detect potential infringements when such works are made available without authorisation from the rightholder.

OCSSPs can also provide information to help demonstrate that they are making best efforts to comply with Art 17 (4) and (5) in order to avoid liability. An example is by doing real-time reporting on the unauthorised uses detected and the actions taken after the rightholders (or their representatives) report the unauthorised uses, and providing details of the response time.

It is important that OCSSPs use best efforts to ensure “stay-down”. Rightholders face the problem of repeatedly having to file complaints with regard to the same work over and over again, costing both time and money. One example of how OCSSPs could demonstrate their best efforts to ensure stay-down is if they had a “content memory” to prevent content previously removed from the platform being accessible again via the platform.

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



A key concern in this section is how the Commission has described “relevant and necessary information”. It appears that this is decided based on the perspective of the service provider, so e.g., if they use fingerprinting the rightholder has to provide fingerprinting information.

This is unacceptable. Allowing the service provider to decide what information is “relevant and necessary” is subject to unilateral and unnecessarily high standards being imposed on rightholders.

Obligations should not be technology specific but whatever is sufficient to identify the work. It is important that technology-specific solutions are not imposed onto rightholders.

4. SPECIFIC LIABILITY REGIME FOR START-UPS (ARTICLE 17.6) – p12

Generally speaking, where the activity of two identical or very similar platforms is the same (irrespective of their size / volume) the liability regime should also be the same. The special liability regime for “new” services under art. 17(6) is sufficient. It is important that the Guidance does not have the effect of watering it down in any way.

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

Concerns have been raised that the Commission in its consultation document has chosen an approach that would introduce a *de facto* limitation to copyright for uses “not likely to be infringing”. It would also have the effect of changing exceptions into “user rights”, contradicting EU and international copyright law.

i) Legitimate uses under Art 17(7)

We are particularly concerned that the Commission’s consultation paper encourages Member States to implement additional exceptions going beyond those referenced in Art. 17(7), e.g., encouraging implementation of optional exceptions under the InfoSoc Directive (applied nationally).

Such an approach would go beyond the mandate of the Guidance, as Member States are only required to implement the exceptions set out in the Art. 17(7) and this was very much the intention of the co-legislators.

It is considered that if such an approach is taken in the Guidance that this will create legal uncertainty including around the new mandatory exceptions introduced by the DSM Directive, as well as creating imbalance between the various fundamental rights.

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

Contrary to the statement in the consultation document, we believe that the “*distinction between likely infringing and likely legitimate uploads*” would introduce “*new legal concepts*”.

It is important that, as stated “*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.*” **It is essential that remuneration for rightholders is not prevented or hindered in any way under the Guidance.**



A particular concern is the possibility for “likely legitimate” uploads to stay up while the possible application of exceptions and limitation is assessed. This, amongst other things, contradicts the service providers’ obligation to expeditiously disable access to or remove unauthorised content from their websites, as set out under Article 17(4)(c), in order not to be held liable.

We therefore think it is important that the Guidance does not use the terms “likely infringing” and “likely legitimate” in order to avoid negatively impacting the balance that was agreed by the co-legislators.

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

While there is a general concern that the Guidance should not be too prescriptive, we welcome the suggestion in the consultation document, in the context of Article 17(9), that OCSSPs provide information “aiming to foster users’ awareness of copyright concepts and to encourage a responsible behaviour when uploading content online”.

Article 7(9) states that OCSSPs shall 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. In order to ensure that this information has real value, it is important that this information is clearly displayed, conveyed in simple, straightforward language. We think it is important that this information should also explain the importance of respecting the “three-step test”, as set out in international and EU law.

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

It is important when considering information to rightholders that there is sufficient information to allow rightholders to be paid for uses of their works.

The reference to the specific reporting requirements in the CRM Directive is useful in terms of ensuring consistency with the approach in that Directive. We would welcome a high level of transparency from OCSSPs, in a similar way that the CRM Directive requires transparency reporting from CMOs.

Where the OCSSP has a licence it is important that it provides detailed information on the uses of the works under the licence, including traffic data generated by the licensed content and the income received by both the OCSSP and the persons who uploaded the work or the subject matter on the platform.

Where the OCSSP does not have a licence they should automatically report in real time on the works uploaded onto their platform for which no licence has been obtained, as well as the time spent to ensure the unavailability of the unauthorised content and, where relevant, the complaints filed by users and the outcome of those complaints.

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