IFRRO COMMENTS ON THE EUROPEAN COMMISSION'S PROPOSED DIGITAL SERVICES ACT[1] ("DSA")

- **About IFRRO**

IFRRO[2], the International Federation of Reproduction Rights Organisations, is the international network of collective management organisations operating in the field of text and image (known as Reproduction Rights Organisations, or RROs). IFRRO has 156 member organisations from over 85 countries.

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.

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.

- **General comments**

IFRRO welcomes the DSA proposal and the recognition that online platforms have now acquired a reach into our daily life, economy and democracy that requires greater responsibilities and the need for updated rules for digital services.

The DSA goes some way towards clarifying the current legal framework for digital service providers and creating obligations that will help create an environment that is less hostile for authors and publishers faced with widespread illegal uses of their works.

We agree with the approach of building on the key principles of the e-Commerce Directive (2000/13/EC), which remain valid, and with the principle of "what is illegal offline is also illegal online". The devil is, however, in the detail and there are problems that remain unaddressed.

A particular concern is that there has been an increase in the levels of unauthorised sharing of text and image works via messaging services, but they do not fall within the DSA's scope.

If the DSA is to ultimately improve the current situation faced by authors and publishers, whose works have become even more vulnerable to piracy and unauthorised uses since the Covid-19 pandemic began, then we consider that certain aspects will need to be reviewed.

We believe that with some adjustments, the DSA can help make a difference in enabling a sustainable future for authors and publishers in the text and image sector, by helping to address the spread of illegal content online, which has seriously impacted the growth of the

[1] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020) 825) (see here)
[2] International Federation of Reproduction Rights Organisations (www.ifrro.org); Identification number in the EU Transparency Register: 860729437196-92

sector. It is crucial that the DSA ensures that fight against piracy and unauthorised use of content becomes much easier and cheaper than it currently is.

IFRRO's (non-exhaustive) comments are focused on the perspective of its RRO members, complementing the comments by national and international stakeholder groups of authors, visual artists and publishers within the IFRRO membership. Those stakeholders will make submissions highlighting their own concerns and perspectives.

One area in which there is a divergence of views amongst the IFRRO membership is on the question of the impact of the proposed DSA on press freedom and how the text should be amended accordingly. For that reason, while the suggestions put forward in this position paper represent IFRRO's view, following a consultation with its members, they do not reflect the view of all IFRRO members.

IFRRO comments on specific aspects of the DSA Proposal

1. Chapter I (General provisions – scope and definitions)

- IFRRO is of the view that the proposed DSA's approach should be focused on "illegal" (not "harmful") content, as broadly defined under Article 2(g) and further clarified under Recital 12 as including "the non-authorised use of copyright protected material".

- We welcome that the proposal clarifies (Article 1(5)b) that it is without prejudice to the rules laid down in other EU laws, including on copyright and related rights. These laws are of particular importance and relevance to IFRRO members.

- It is important that the approach is also consistent with and complements other relevant EU legislation (e.g., relating to copyright / IPR enforcement), as well as related policies, including e.g., the EU IP Action Plan, which recognises the essential role / benefits of copyright and licensing, and other EU initiatives that aim to tackle the huge problem of piracy within and beyond EU borders[3].

- It is welcome that the proposal applies to intermediary services provided to recipients of the services that are established or resident in the EU, *irrespective of the place of establishment of the providers of those services*.

- A particular concern is that emails and private messaging services fall outside the scope of the DSA. The concept of 'dissemination to the public' is defined as making information available to "a potentially unlimited number of third parties" (Article 2(i) / Recital 14). The concern is that the DSA will exacerbate an already growing problem[4] and lead to online infringements moving to these services with impunity, contrary to the ethos of the DSA.

  We therefore suggest that the approach of excluding interpersonal communication services is reviewed, to avoid a loophole that will put rightholders – and the production of diverse, quality content – even more under threat at an already difficult time.

[3] See further details, see IFRRO article on book piracy here

[4] See e.g., summary of research by the Coalición de Creadores here.

2. Chapter II (Liability of providers of intermediary services)

Chapter II establishes when the provider of an intermediary service cannot be held liable in relation to illegal content provided by the recipients of the service.

- IFRRO welcomes that the DSA, under Arts. 3, 4 and 5, maintains the existing liability exemption regime from the E-Commerce Directive (2000/31/EC) and there is no general monitoring obligation (Art. 7).

- While the DSA aims to ensure a "safe, predictable and trusted online environment", concerns have been raised that the approach to Art. 6 creates legal uncertainty and will have the effect of creating a new "safe harbour". It is important that this is avoided.

- Art. 6 states that "*providers of intermediary services* ***shall not be deemed ineligible for the exemptions from liability*** *referred to in Articles 3, 4 and 5 solely because they carry out voluntary own-initiative investigations or other activities aimed at detecting, identifying and removing, or disabling of access to, illegal content, or take the necessary measures to comply with the requirements of Union law, including those set out in this Regulation*". While Recital 25 indicates that this rule does not imply that the provider *can necessarily rely* on the liability exemption, in our view the language in Art. 6 / Recital 25 could be further clarified to avoid the effect of creating a new "safe harbour".

- Another concern with the current approach is that service providers will have a lot of leeway to implement measures unilaterally with no possibility for scrutiny, including in relation to the effectiveness of those measures such as, for example, detection, identification, and disabling of access or removal of illegal content.

  We therefore suggest that Art. 6 / Recital 25 are reviewed. It is important that there are safeguards in place for affected parties, such as being involved in own-initiative investigations from the outset, including as regards the detection, identification and disabling of access to / removal of illegal content.

3. Chapter III (Due diligence obligations for a transparent and safe online environment)

IFRRO in general welcomes the introduction of due diligence obligations to help clarify the obligations of service providers. Concerns have, however, been raised about certain aspects of these provisions which might hinder rather than help rightholders.

Section 2

Notice and Action Mechanisms

- Under Section 2, Article 14 (Notice and action mechanisms) obliges providers of hosting services, including online platforms, *to put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content,* and to *facilitate the submission of* notices. The notice must include all of four different elements listed (Art. 14(2)a – d).

- In order to allow rapid responses, it is important from a rightholder perspective that the requirements under this mechanism are not overly burdensome or impractical. There is a concern, for example, that the requirement to provide the "exact URL or URLs" might be difficult to satisfy in some instances, as operators of illicit websites may well make minor changes in the URL of illegal content found online to avoid their legitimate responsibility to act expeditiously against infringing content.

  We suggest that the elements listed under Art. 14(2) a-d are reviewed to ensure that they focus on what is needed for a hosting service to act when alerted to illegal content, and do not include unnecessary or overly burdensome elements.

  We also suggest that the "notice and take down" mechanism is adapted to be a "notice and stay down" mechanism. Within the IFRRO community, despite concerns that such a measure might impact on press freedom, given the major issue of piracy and unauthorised use of content due to platforms' current practices, we take the view that this approach is the only real alternative.

Section 3

Under Section 3, there are proposals that could potentially – with further amendment – be helpful in allowing action against illegal content to be taken more quickly, effectively and reliably, such as the provisions on "trusted flaggers" and "traceability of traders".

Concerns have been raised, however, that the impact of the Regulation will be diminished by excluding platforms that qualify as "micro or small enterprises" from the provisions in this section. Many illegal activities are undertaken by services of this size.

Trusted flaggers

- Notices from **"trusted flaggers" (Article 19)** - including "rightholder organisations" - could help ensure that illegal content is taken down "with priority and without delay" and "without prejudice to the requirement to process and decide upon all notices submitted under those mechanisms in a timely diligent and objective manner" (Recital 46).

- There have been suggestions that the proposal could be more effective if it wasn't limited to entities representing "collective interests".

- Trust in both the Digital Services Co-ordinators that would award the status of trusted flaggers, as well as the flaggers themselves, is essential for such a system to work.

  We suggest that it would be important to have, for example, more clarity about the criteria used in the selection and verification process for Digital Services Co-ordinators.

Measures and protection against misuse

- It is welcomed that the Commission has put forward provisions aiming to address misuse of online platforms' services by recipients of those services (Article 20). There is however concern that limiting measures to temporary suspension only in cases where "manifestly

illegal" content is "frequently" uploaded by users will not significantly improve the current problem of the availability of illegal content, and that this approach may even represent a weakening of measures for some platforms.

We therefore suggest that Article 20 and Recital 47 are reviewed in order to ensure that these measures are as effective as possible in minimising the availability of illegal content online.

Traceability of traders

- We believe that the provision requiring **traceability of traders (Article 22)** – also known as "Know Your Business Customer" – could "contribute to a safe, trustworthy and transparent online environment" for consumers as well as "holders of intellectual property rights" (as Recital 49 suggests). Online platforms must ensure that traders selling to consumers on their platforms are traceable by obtaining various information and make "reasonable efforts" to verify the reliability of the information provided by the traders.

- It is considered that in order to fight effectively against illegal content, it would be beneficial for these traceability requirements to extend to other online services (e.g., payment services) that enable traders to carry out and benefit from providing illegal content. In addition, in order for these provisions to be effective, they must be properly enforced to ensure that traders do not evade these obligations.

  We suggest that further consideration is given as regards how the proposal can be improved in the field of traceability of traders.

4. Chapter VI (Implementation, cooperation, sanctions and enforcement)

- IFRRO in general welcomes that the proposed DSA puts forward new mechanisms that open up the way for a more robust enforcement of the rules. These include enhanced cooperation and coordination among national competent authorities and the possibility for the Commission to intervene vis-à-vis very large online platforms in case the infringements persist and issue fines for non-compliance.

  It is welcome that "individuals or representative organisations" should be able to lodge any complaint related to compliance with the Regulation with the Digital Services Coordinator in the territory where they receive the service…" (Recital 81). We would suggest that this is clarified in the corresponding Article 43, DSA.

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