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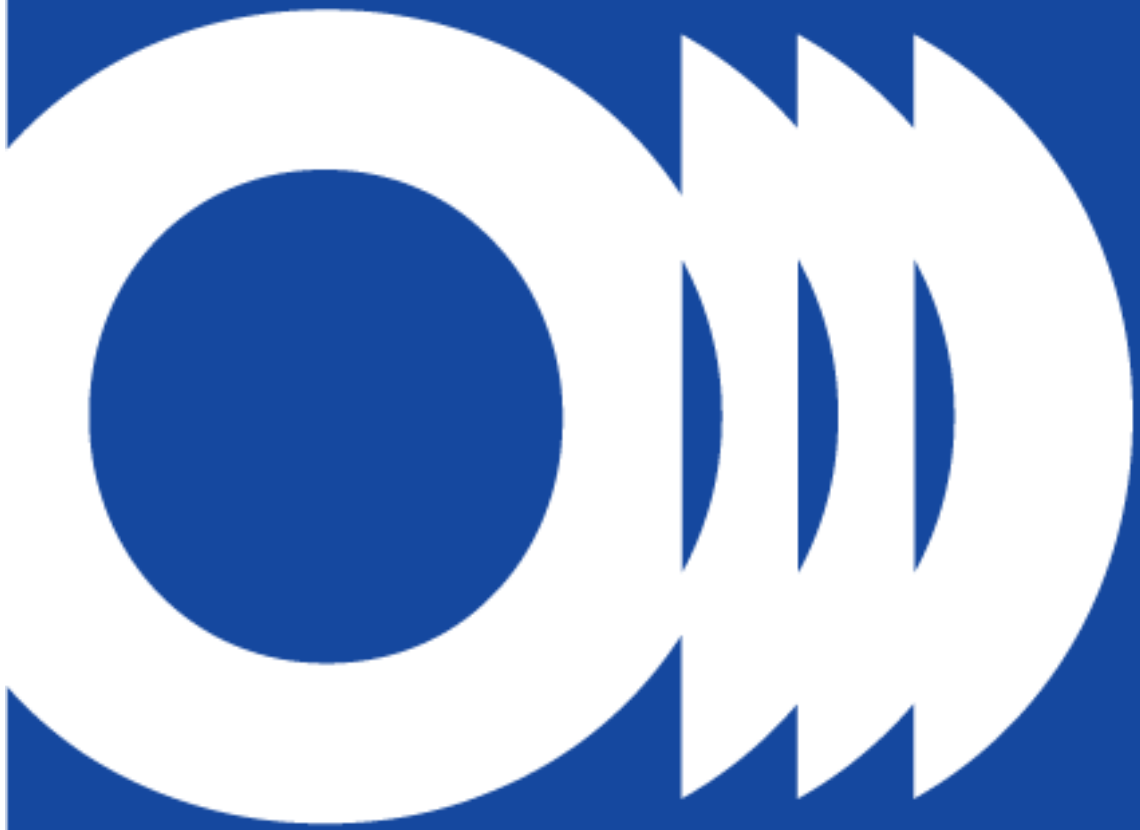
POSITION PAPER

EBU response to the consultation on Article 17 of the Directive on Copyright in the Digital Single Market

10 SEPTEMBER 2020



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10/09/2020

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

The European Broadcasting Union ('EBU')[1] and its Members, public service media ('PSM') organisations from 56 countries across Europe and beyond, welcome the opportunity to provide inputs to this targeted consultation.

Responses to the questions asked in this context were submitted via the European Commission online public consultation platform; EBU's comments were inserted in the respective comment fields as appears in the following lines.

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.

The OCSSP definition includes "…*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*". It should be made clear that 'profit-making purposes' does not require proof of actual profit being made.

A large amount cannot be a fixed number for all cases but is a dynamic factor that depends on the nature of uploaded works and the user group and it needs to be assessed on a case by case basis.

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.

It is essential that the European Commission states in the Guidance that contractual freedom is crucial; the consequence is that rightsholders are entitled, but not obliged, to request Online Content Sharing Service Providers (OCSSPs) to conclude licence agreements for third-party uploads. Rightsholders may refuse to give OCSSPs their authorisation when they prefer to have their content taken down, where this content is illegally used.

It should be clarified by the guidance that Article 17 makes the OCSSPs responsible for the communication to the public originally pursued by the user as uploader and that Article 17 does not create any new right. The notion of 'authorisation' for the act of communication to the public in Article 17(1) remains subject to national law and the different schemes available to that extent, including in particular contractual arrangements.

Moreover, the guidelines should clarify that under Article 17(2) uploaders of protected content, to which they have the necessary rights, do not waive their right to seek the unavailability. They should remain free to decide whether such content uploaded by other users (infringing their rights) can under certain conditions be tolerated or must be taken down and/or blocked according to Article 17(4) sub (b) and (c).

[1] www.ebu.ch

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?

OCSSPs could inform user, at the point of upload, that the use of specific content has been authorised.

Where dispute mechanisms exist currently, users are able to provide information to rightsholders within the platform, however rightsholders must email the user of platform to reciprocate. OCSSPs should facilitate information sharing between rightsholders and users by expanding their current system within the platform to enable faster resolution when problems arise.

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.

Contacting the relevant PSM with a concrete proposal would constitute a key first step towards showing best effort to obtain authorisation. Under Article 5 of Directive 2010/13/EU, PSM are under a legal obligation to make easily, directly and permanently accessible to the recipients of their services their name; the address of their place of establishment, as well as contact details, including an email address or website, which allow them to be contacted rapidly in a direct and effective manner. Platforms can therefore easily identify and contact PSM in the different Member States and should do so in order to fulfil the criterion laid down in para Article 17(4)(a). That said, a lack of reply from a broadcaster cannot be deemed as an implied authorisation.

Moreover, the notion of best efforts to obtain an authorization must include the requirement to negotiate on the terms and conditions of said authorisation, making a one-sided “take-it-or-leave-it” approach by the OCSSP not acceptable.

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?

When it comes to seeking authorisation to upload PSM content online, given the ease of identification, the nature of the content (general interest content) and the limited staff in PSM that deals with these issues, there should not be any difference between small and large OCSSPs.

The obligations to obtain licences should apply to all types of content provided that the rightsholders are willing to conclude a licence with OCSSPs under reasonable terms.

OCSSPs should offer authorisation models depending on the frequency of the type of content, based on a case by case analysis.

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.

As mentioned above under question 4, the Guidelines should clarify that an absence of reply from a broadcaster cannot be deemed to be a tacit authorisation.

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.

Services and methods identifying the presence of illegally uploaded content online are available. And, illegally uploaded content is an infringement regardless of the size of platform on which it is uploaded. OCSSPs must comply with the highest industry standards.

Where OCSSPs do not offer technological solutions, there should be fixed periods after notification of infringement in which to act. There should be maximum consistency between the OCSSPs notification procedures.

The use of the technologies can only be efficient if it is supported by an efficient communication flow between platforms and the rightsholders, including PSM. Consequently, platforms should also provide an easy access to contact persons in charge of the technologies deployed and for information on any updates, including those changing the steps to be carried out by the rightsholders.

The assessment of the 'high industry standards of professional diligence' should be evolving with time and take into account the progress made in developing most refined tools.

In a perfect world, all OCSSPs would offer either proprietary or third-party rights management services, alongside the notice and takedown forms, which should be mandatory.

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)?

The 'necessary and relevant information' will depend on the technologies used by the OCSSPs. Once again, it is for the service to ensure an efficient communication flow with the rightsholders to allow them to cooperate smoothly in order to ensure an effective use of the tools. In the case of audiovisual productions from PSM broadcasters, the necessary and relevant information is the same as for other audiovisual productions. Case law (related to InfoSoc, eCommerce and IPR Enforcement Directives) shows that a few key details are sufficient.

For the sake of clarity, it should be recalled that in cases where the OCSSP is no longer exempted from liability after receiving a "substantiated notice", this situation is covered (also) by Article 14 of the Directive on Electronic Commerce.

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?

A sufficiently substantiated notice should show that the person claiming to be a rightsholder indeed owns the rights he pretends to. In the case of broadcasters, which are the most heavily regulated producers of audiovisual content, there should be a presumption that any notice from an established broadcaster is sufficiently substantiated.

Cooperation between OCSSPs and broadcasters should be encouraged in the guidance in order to make the process of filing notices efficient (*e.g*. automatic filing processes).

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.

Take down should mean stay down, and OCSSPs should make best efforts to prevent reuploads of illegitimately uploaded PSM content by third parties.

Please see also the answer to question 13.

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?

One important element is missing for PSM: it is important that broadcasters, in particular PSM, as trusted uploaders and key promoters of free speech, are in principle excluded from strikes and/or take downs, so that they can offer content of public interest. Broadcasters, in particular PSM, are indeed the most regulated distributors of content – the regulation they have to respect includes fundamental rights and the rules apply also to their online content.

At least, as regards *ex-ante* measures (*e.g.* filters), PSM content should not be blocked. In such situation where the OCSSP wants to block the content, PSM should be able to claim that such content is cleared. Broadcasters should have the possibility to clear all the rights, including with the collecting societies, for all their content. However, if a broadcaster agrees with the rightsholders or the collecting societies, that the OCSSP shall be responsible for clearing the right to communicate to the public with those rightsholders and collecting societies directly, the broadcasters, as trusted uploaders, should be excluded from strikes and/or take downs, so that they can offer their content, for example on their own channels on the platform.

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)?

In view of the answer to the previous question, content uploaded by broadcasters, in particular PSM, should not be taken down. If this happens by mistake, this content should not stay down. In that case, after taken down, it should immediately be reuploaded and the burden of proof must be with the claimant to show that the content involved should stay down.

OCSSPs should facilitate communication on the platform between rightsholders and individual users submitting dispute information.

Please see also the answer to question 13.

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.

Enabling OCSSPs to categorise user uploaded content, using rights management systems, as ‘likely infringing’ or ‘likely to be legitimate’ upon upload is not a realistic solution to the problem of balancing interests. This assessment should not be made by OCSSPs, however PSM rightsholders do not have

capacity to review thousands of pieces of content in a timely manner on multiple platforms, and it is not reasonable to impose such an administrative burden on the party that is trying to defend the value of the work.

A solution would be to ensure robust redress mechanisms are in place for swift resolution.

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.

Information on the use and the efficiency of the technologies implemented by OCSSPs should be made available to the rightsholders and should be sufficiently transparent and precise to allow rightsholders to assess the efficiency of the technologies for the different types of content uploaded.

Information should be adapted to the types of measures but should include in any event: the number of content struck down and/or taken down, the number of claims by rightsholders, the number of counterclaims by users, the number of successful counterclaims. In the case of fingerprinting or watermarking, it would be helpful to obtain general information on the percentage of content matched with a fingerprint or a watermark.

This information should be broken down per type of content (*e.g*. music, AV, images), in order to allow the rightsholders to have a clear picture of the efficiency of the measures in their respective sector. For PSM, information on audiovisual and audio content would be for instance particularly important.

The guidelines should explicitly encourage OCSSPs to provide individualised information to rightsholders. This information may include information on the notice sent by PSM, those received by PSM as well as similar information regarding strikes. The guidelines could stress that this information would allow rightsholders to have a clear picture of the use of their content online and to be able for instance to better identify repeated infringers and conflicts of rights with other rightsholders to ensure a smoother management of the rights pertaining to the content uploaded on the platforms.

Furthermore, the obligation to provide information should also include a communication of this information to the person of contact within the PSM, including updates of the tools and practical implications of these changes for PSM. These general data on unauthorised content removal should systematically be made extractable by OCSSPs and accessible to the relevant rightsholders.

Finally, it is important that the information on exceptions and limitations to exclusive rights that needs to be provided by OCSSPs to users, is accurate and corresponds to the manner in which these exceptions and limitations are implemented under the applicable national laws. This is necessary given the fact that these exceptions and limitations are subject to human review on the side of the OCSSPs.

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.

There are very few users on individual platforms generating 'significant revenues', so any practical guidance under Article 17(2) should recognise that 'significant revenues' within the market may be very low.

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