



Brussels, 10 September 2020

To: Commissioner Breton, Internal Market, European Commission

Dear Commissioner Breton,

We are representatives of a broad group of right holders including creators from all artistic fields; book, press, musical, scientific, technical and medical publishers; the recorded and published music industries; film and TV producers; sporting event organisers; TV and radio broadcasters; distributors; photo agencies, cinema operators and a major European telecom operator that also runs a pay TV platform and produces in-house content.

We are writing to you to express our serious concerns regarding the European Commission's consultation on its proposed guidance on the application of Article 17 of the Directive on Copyright in the Digital Single Market ("the Directive").

Cultural and creative sectors are copyright-based ecosystems that directly employ over 11 million people across the EU (5.5% of total employment), contribute €1,000 billion to EU GDP (6.9%), provide a €92 billion trade surplus to the EU, and offer a wage premium of 59% compared with non-IPR intensive industries¹. If Europe wants to be a digital leader and secure its economic development, it must focus on creation, investment in cultural and creative content and support the growth potential of copyright-based sectors. It is for this reason that it is imperative that we see a faithful transposition of the Directive to support this.

We are very concerned that, in its Consultation Paper, the Commission is going against its original objective of providing a high level of protection for rightsholders and creators and to create a level playing field in the online Digital Single Market. It interprets essential aspects of Article 17 of the Directive in a manner that is incompatible with the wording and the objective of the Article, thus jeopardising the balance of interests achieved by the EU legislature in Article 17.

By interpreting Article 17 in a manner that is contrary to the intent of the EU legislature and the EU copyright acquis, the proposed guidance amounts to an attempt to rewrite the Directive and amend EU copyright law without due legislative process.

This approach would also conflict with the Commission's decision to make culture one of Europe's priority ecosystems for recovery from the impact of the COVID-19 pandemic. Damaging our business by rewriting what has already been agreed in the Directive completely cuts across our ability to contribute to Europe's recovery. We urge the Commission to instead encourage a faithful transposition of the Directive.

Without prejudice to fundamental rights, including the freedom of expression, we detail in annex, some of our main concerns with respect to the proposals that go beyond the legal limits of the Commission's authority under EU law. Each of the undersigned organisations have, in addition, made their own more detailed individual submissions.

We urge you to take our concerns into consideration when elaborating the final guidance and remain available to discuss.

Yours sincerely,

IFPI - The International Federation of the Phonographic Industry is the organisation that promotes the interests of the international recording industry worldwide. IFPI's mission is to promote the value of recorded music, safeguard the rights of record producers and expand the commercial uses of recorded music in all markets where its members operate.

ACT - The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters across Europe and beyond. The ACT member companies finance,

¹ EPO/EUIPO report *IPR-intensive industries and economic performance in the European Union*, September 2019

produce, promote and distribute content and services benefiting Europeans across all platforms.

CEPI - The European Coordination of Independent Producers was founded in 1990 to organise and represent the interests of independent cinema and television producers in Europe. It represents approximately 8000 independent production companies in Europe.

CEPIC - As the Center of the Picture Industry, CEPIC federates 600 picture agencies and photo libraries in 20 countries across Europe, both within and outside the European Union. CEPIC's membership includes large and smaller stock photo libraries, major photo news agencies, art galleries and museums, video companies.

ECSA - The European Composer and Songwriter Alliance represents over 30,000 professional composers and songwriters in 27 European countries. With more than 60-member organisations across Europe, the Alliance speaks for the interests of music creators of art and classical music (contemporary), film and audiovisual music, as well as popular music.

EPC - The European Publishers Council brings together Chairmen and CEOs of Europe's leading media groups representing companies with newspapers, magazines, online publishing, journals, databases, books and broadcasting, communicating with Europe's legislators on issues that affect freedom of expression, media diversity, democracy and the health and viability of media in the EU.

EUROKINEMA - EUROKINEMA, represents the interests of film and television producers to the European Union bodies concerning all the issues directly or indirectly affecting film production.

FEP – The Federation of European Publishers represents 29 national books and learned journals publishers' associations of the European Union and the European Economic Area.

FIAD - The International Federation of Film Distributors' Associations gathers national organisations of film distribution companies covering the entire range of companies: small and medium-sized companies specialized in art house films, as well as larger companies focused on mainstream films. FIAD's members operate in 14 countries where they cover 90 to 100 percent of the theatrical market.

FIAPF – FIAPF's members are 34 film and TV producer organizations from 27 countries, including 15 in the EU/EEA. Their activities include the development and production of films and audiovisual content which are distributed offline and online via all forms of authorised and legal online distribution channels.

GESAC – The European Grouping of Societies of Authors and Composers comprises 33 authors' societies from across the European Union, Norway, Iceland and Switzerland. It represents over 1 million creators and rights holders in the areas of musical, audio-visual, visual, literary and dramatic works.

ICMP - is the world trade association for music publishers and companies. We represent more than 90% of the world's published music. Our membership comprises 61 national associations, including each of the 27 EU Member States.

IMPALA - IMPALA is the European association of independent music companies, representing close to 5,000 music SMEs. Its mission is to grow the independent music sector, return more value to artists, promote cultural diversity and entrepreneurship, improve political access and modernise perceptions of the music sector.

IMPF - The Independent Music Publishers International Forum represents independent music publishing companies worldwide and serves as a global network and meeting place for music publishers.

IVF - The members of the International Video Federation are associations representing businesses active in all segments of the film and audiovisual sector in Europe. Their activities include the development, production, and distribution of films and audiovisual content as well as their publication on digital physical carriers and via all forms of authorised and legal online distribution channels (TVOD, SVOD, AVOD).

Mediapro - is a multimedia communications group in Spain. Founded in 1994 in Barcelona, the company is involved in movie and television production, as well as media.

MPA – The Motion Picture Association is the leading advocate of the film, television, and streaming industry around the world.

NME – News Media Europe, the voice of the progressive news media industry in Europe, representing over 2400 news brands, online and in print, on radio and TV.

SROC - The Sports Rights Owners Coalition is a forum of over 50 international and national sports bodies and competition organisers, with a particular focus on rights issues.

STM - is the leading global trade association for academic and professional publishers. The membership is composed of over 140 organisations who are based globally and include academic and professional publishers, learned societies, university presses, start-ups and established players.

Telefónica - is a Spanish multinational telecommunications company headquartered in Madrid, Spain. It is one of the largest telephone operators and mobile network providers in the world. It provides fixed and mobile telephony, broadband and subscription television, operating in Europe and the Americas.

UNIC - The Union Internationale des Cinémas/International Union of Cinemas (UNIC) represents the interests of cinema trade associations and cinema operators covering 38 countries in Europe and neighbouring regions.

ANNEX

- Contrary to a clear statement in recital (64) that Article 17 seeks to *clarify* the application of the “communication to the public” and recital (4) which confirms that the 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*”, the Commission states that Article 17 is a *lex specialis* to Article 3 of Directive 2001/29/EC and of Article 14 of Directive 2000/31/EC in a way that Member States “*would not be able to rely in their transposition of Article 17 on their implementation of [the Copyright Directive and E-Commerce Directive] in relation either to the notion of ‘authorisation’ or indeed for the notion of ‘the communication to the public’*”. Such a view is not supported by the Directive and is incorrect. **As set out in recital (64), Article 17 clarifies the application of the existing communication to the public right in Article 3 of the Copyright Directive to Online Content Sharing Service Providers (OCSSPs, as defined in Article 2(6) of the Directive) in line with the existing EU and international copyright law.**
- The Commission’s interpretation of the application of the proportionality principle set out in Article 17(5) is not in line with the Directive. Article 17(5) refers to the proportionality of the measures OCSSPs must take to comply with their obligations under Article 17(4)(b) and (c), which should be assessed on a case-by-case basis. It cannot be used to dilute the high “best efforts” standard that OCSSPs must meet when seeking authorisations under Article 17(4)(a) and when taking steps to prevent and remove unauthorised content under 17(4) (b) and (c). Article 17(7) is not part of the proportionality test under Article 17(5). It requires, as a second step, to ensure that OCSSPs do not prevent the availability of content which is covered by an exception or limitation to copyright and related rights. The Commission’s proposal would lead to a double-dilution of the unlicensed OCSSPs’ obligations under Article 17(4) to act as diligent economic operators. **The discretion conferred on Member States by Article 17(5) must be exercised within the limits established – and for the purpose of the case-by-case assessment required – by Article 17(4) of the DSM Directive. Neither the Commission nor Member States may dilute the objective standards clearly and expressly established in the Directive.**
- The Commission’s view on the operation of Article 17(4), which sets out the conditions that an OCSSP must meet to benefit from the special liability regime, undermines the effectiveness of the entire Article. The Directive sets out a process whereby users’ ability to benefit from applicable copyright exceptions, as required by Article 17(7), is guaranteed by an *ex-post* complaints and redress mechanism set out in Article 17(9). However, contrary to the Directive, the Commission states that OCSSPs should assess the applicability of exceptions *before they are made available*, based on the ill-defined and nebulous concepts of “*likely infringing*” and “*likely legitimate*” uploads. The Commission’s proposed model is practically unworkable and is manifestly incompatible with the wording and objectives of Article 17(4). In particular, the possibility for “likely legitimate” content to “stay up” – while the possible application

of exceptions and limitation is assessed – is inconsistent with this provision, as interpreted in light of its context and purpose. It also contradicts the obligation on the service providers to expeditiously disable access to or remove unauthorised content from their websites, as required by Article 17(4)(c), in order not to be held liable. We are further concerned that the guidance would envisage the complaint and redress mechanism to be subject to the country of origin principle and not the country of destination principle, as is the case today. This would create legal uncertainty and is highly problematic, as it completely deviates from the letter of the Directive and the related *acquis communautaire*. **The Commission’s proposal would create a new *de facto* limitation to copyright for uses “not likely to be infringing”, in contradiction with the internal logic of this Article and the legal framework for exceptions under EU and international copyright law.**

- The Commission’s call to Member States to implement additional exceptions to the ones specifically identified in Article 17(7) goes against the requirements of Article 17 and is a scenario that was specifically rejected by the co-legislators during the legislative process. Article 17(7) and recital (70) clearly state that the only exceptions that in certain special cases might underpin the freedom of expression of users are the existing quotation and parody exceptions (Articles 5(3)(d) and 5(3)(k) of Directive 2001/29/EC). Calling on Member States to optionally implement additional exceptions, which would be only of national application (as all the exceptions of Article 5(2) and (5)(3) of Directive 2001/29/EC), would create legal uncertainty, including around the new mandatory exceptions introduced by the Directive, and break the careful balance of interests found in Article 17. **The Commission’s proposal would weaken the harmonising nature of Article 17 and goes beyond the mandate of the guidance. The implementation of Article 17 only requires Member States to implement the two exceptions specifically mentioned in Article 17(7), and not any other, as strictly intended by the co-legislators.**