



IMPF Response to the Targeted Consultation on Article 17 of the Directive on Copyright in the Digital Single Market

We write on behalf of IMPF (Independent Music Publishers International Forum). IMPF is a network and meeting place for independent music publishers globally. IMPF is an Associate Member of CISAC and ICMP and we support any submissions and comments made by these organisations. We are grateful to have the opportunity to join this new consultation to reiterate some issues that are critically important for the community of independent music publishers, not just in Europe, but globally.

Music publishers, as rightsholders, provide consumers with access to a wide selection of music. There are currently hundreds of digital music services licensed worldwide, and over 50 million tracks available online. Digital services have greatly benefitted from the use of those copyrighted works when they have been made available online without rightsholders' authorisation, thereby excluding the latter from a fair share of the revenue those services generate.

The introduction of Article 17 helps ensure that those digital service providers that have been hiding behind the safe harbour provisions of the E-commerce Directive are also held liable for the content uploaded by their users and which the providers make available to the public thereby benefitting financially. Article 17 does not create additional responsibilities, rather, it ensures that the European Digital Single Market works as it was always intended.

We are therefore very concerned by the interpretation the European Commission (EC) gives to Article 17 of the Digital Single Market Directive (DSM) in the Consultation Paper, which undermines the value of copyright and the original intention of the Directive. By interpreting Article 17 in such a manner, the EC is *de facto* asking Member States to rewrite the Directive and to amend EU copyright law without a proper consultation and legislative process.

In light of this, we entreat the EC to accurately follow the objective of the DSM Directive when elaborating the final Guidance document, that is to create a level playing field in the online Digital Single Market and to strengthen the ability of European rightsholders to create and invest in new and diverse content across Europe. When implementing Article 17, we urge Member States to faithfully follow the intention of the Directive and remember that any Guidelines for interpretation are by no means binding. In particular:

SCOPE OF THE SERVICES COVERED BY ARTICLE 17

1. The objective of Article 17 is to foster the development of the licensing market between rightsholders and online content-sharing service providers (OCSSPs) and this should be the guiding principle when implementing the Directive. Licensing agreements are the optimal way to ensure that that the works of authors and composers are rewarded while also being protected from copyright infringements. Licensing agreements are therefore the most secure way of obtaining authorisations to communicate to the public or to make copyrighted works available to the public. Music publishers are

accustomed to grant licenses on a straightforward, and even automated basis in many instances. As rightsholders, we fully embrace the use of music in digital services.

2. Member States should ensure that the definition of online content-sharing service providers (OCSSP) is crafted in a sufficiently clear way so that it enables the inclusion of all services that store and make available copyright content uploaded by their users. We would caution against any specification in national law of the services that are excluded from the scope of OCSSP. Overly explicit exclusions as cited in Article 2(6) of the Directive risk making it inefficient in the (near) future. One exemption today for a certain type of service, will mean thousands of services building their business model on the back of such exemptions tomorrow. Article 17 should allow technologically neutral and future proof solutions.

AUTHORISATIONS

3. Any guidance on authorisations by rightsholders should be sufficiently clear as to the overall objective of the Directive.
 - Article 17 is not *sui generis* right. It neither provides a wholly special regime from that already envisaged under the pre-existing *acquis* nor does it provide a new right of communication/making available to the public. It clarifies that certain digital service providers – which claimed to be mere intermediaries with no responsibility – indeed qualify as online content sharing service providers (OCSSPs) and perform a copyright relevant act, and therefore should be held liable for the content they make available to the public.
 - There should be no re-definition of Articles 3 and 4 of the InfoSoc Directive which are still entirely valid. Article 17 does not preclude that other services, not covered by the OCSSPs definition, also perform a copyright-restricted act, as per Articles 3 and 4 of the 2001 InfoSoc Directive. The reproduction acts carried out by OCSSPs should also require authorisation, as per Article 2 of the InfoSoc Directive.
 - There should be no broadening of exceptions and limitations. The concepts of quotation, criticism, review, parody, caricature, pastiche are autonomous concepts of EU law, and must be interpreted uniformly throughout the EU and in accordance with CJEU case law, without any possibility for Member States to alter the scope thereof.

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

4. Rightsholders should remain free to decide on the commercial exploitation of their works, on the basis of the rights granted by the authors and composers of those works. Any licensing model must respect the economic balance of the ecosystem. OCSSPs should be incentivised to negotiate licenses that ensure fair rates for rightsholders.
5. We do not see any difficulty for smaller service providers to obtain authorisation from rightsholders. Music publishers are used to granting licenses on a daily basis. Music publishers are continuously working on creative ways to grant all type of licenses in a customised manner depending on the need and the user. In addition, we work closely with collective management organisations and authors and composers to develop guidelines that facilitate and standardise small-scale licensing. We also engage in discussions with users on this matter. Smaller OCSSPs can always contact CMOs for the use of a certain repertoire. There are always ways to obtain authorisations.

Furthermore, the proportionality principle cannot be used as an instrument to dilute OCSSPs' *best efforts* obligation to seek authorisation. Article 17(5) only refers to the proportionality of the measures that OCSSPs must take to comply with obligations under Article 17(4)(b) and (c), and in no way to the best efforts OCSSPs need to meet when seeking authorisations under Article 17(4)(a).

NOTICES SUBMITTED BY Rightholders TO REMOVE UNauthorISED CONTENT

6. "Sufficiently substantiated" notices can only work properly if they are not too cumbersome. Arduous notification procedures, not implementing an efficient "stay down" policy, and not implementing efficient mechanisms to stop, limit and prevent infringing content are some examples of OCSSPs not making their best efforts to ensure the unavailability of specific unauthorised content.

SMALL OCSSPs

7. There is much discussion and concern about smaller OCSSPs and their capacity to adapt to the requirements of Article 17. However, there is no mention about the need to protect smaller rightholders from copyright infringements. Small rightholders – such as many of the companies that IMPF represents - are particularly vulnerable when negotiating with OCSSPs and are often the ones with no financial or human resources to police the Internet in search of infringing content. In the implementation of the Directive, Member States should not deviate from the aim of the Directive. OCSSPs, irrespective of their size, are responsible for carrying out a copyright relevant act when they give the public access to copyright-protected works uploaded by users, and therefore shall seek authorisation from rightholders.

TOOLS ENSURING UNAVAILABILITY OF UNauthorISED CONTENT

8. For the music industry, the time between us identifying an infringement of our copyright and the time when the OCSSP removes or blocks the content from its service should be as short as possible. We are concerned that the wording in the article leads to overly long and burdensome procedures which could be catastrophic for our works in many instances (i.e. early releases). It is essential for rightholders to be able to have the illegal content taken down expeditiously once it has been identified, since infringements can cause immense damage in a very short period of time. 'Expeditious' must therefore be interpreted in a way which is meaningful in relation to the internet medium. The application of the "country of origin" to the complaint and redress mechanism is wrong in our view. Under copyright rules, the principle of the country of destination applies to better protect the rightholders' interests.
9. Article 17 is not creating additional responsibilities; the majority of the online service providers are already using content recognition techniques to deal with infringing content. However, we believe it should be absolutely clear that OCSSPs should bear the responsibility to put in place efficient mechanisms to stop, limit and prevent infringing content. These mechanisms should reflect the best possible standards. We also call for the introduction of accurate and transparent reporting mechanisms from the services as this is the basis to identify the remuneration that rightholders should receive.

10. It would also be useful for OCSSPs to include in the authorisation agreements with rightsholders, information on how content is prevented and blocked from their services, and statistics on removals, and information on their “repeat infringer” policy. Furthermore, the EC should clarify the distinction between the prohibition of any general monitoring obligation - to be understood as “blind” searching for any potentially illegal content with no prior identification of what content to search for -, and the monitoring of specific content for which rightsholders provide specific information, which is permitted and should be encouraged.

IMPF cannot reiterate enough the importance of faithfully implementing Article 17. The ultimate goal is to foster the development of a fair licensing market between rightsholders and online content-sharing service providers. We call on the EC therefore to be absolutely resolute when elaborating the final Guidance paper and to work with Member States in the implementation of this Directive so as to be loyal to this principle as it is the only way to ensure a fair and efficient digital single market.

The accurate implementation of Article 17 is also a matter of urgency as a result of the unprecedented nature of Covid19, given that the music sector is among the first and hardest hit with the devastating financial impact for songwriters, composers, and authors. Article 17 can help ameliorate this by ensuring an essential source of revenue for all rightsholders.

With high levels of self-employment and scant access to social benefits, the loss of income due to the pandemic directly threatens the very existence of not just thousands of authors, composers, and performers, but publishers and the rest of the music chain, many of whom struggle to earn a living even under normal circumstances.