

Reply from the French authorities to the public consultation organised by the Commission for the participants to the stakeholder dialogue on article 17 of the directive on copyright in the digital single market

Courtesy translation

Major advance made during the previous term, article 17 of directive 2019/790/EC guarantees the effective application of copyright and related rights on content sharing services while reinforcing users' rights

Resting on a delicate balance reached at the conclusion of long political negotiations, it means creators will either be remunerated by content sharing platforms involved in the widescale distribution of their works or able to secure effective preventive measures guaranteeing that access to unauthorised content is not available. It also provides users with greater legal safeguards: the non-commercial uses in which they engage will now be covered by the authorisation obtained by platforms and new guarantees will be open to them within the framework of the complaint resolution mechanism introduced by the directive. A specific regime has been set out for recently-established companies and a principle of proportionality is to be applied where the appreciation of platforms obligations is concerned.

Article 17§10 appoints the Commission, following examination of best practices and consultation with relevant stakeholders, to issue, "*guidance on the application of article 17*", "taking into account *the results of the stakeholder dialogues*" and which particularly concerns the cooperation between content sharing services and rightsholders regarding the implementation of preventive measures. This guidance does not aim to provide any form of legal interpretation of the directive whatsoever. Its purpose is of an essentially technical and operational nature, the intention being the best practical application of article 17, in accordance with its objective as reiterated above and the provisions adopted by co-legislators.

At the end of July, Commission services submitted a preparatory document for the adoption of the guidance.

This document, which carries out a detailed legal interpretation of article 17, along with precise recommendations for its implementation, raises very important concerns.

From a methodological perspective, the project by far exceeds the framework for Commission guidance and offers scant detail on expected concrete, documented elements on cooperation best practice.

In terms of the substance, the recommended approach critically jeopardises the balance established by co-legislators, due to the redrafting of directive provisions in contradiction with both the spirit and the provisions thereof.

If such an approach was taken by the European Commission in its guidance and followed by the involved parties, the expected effectiveness of article 17 would be severely compromised.

The French authorities emphasise that the goal of supporting the standing of creators and the cultural industries which gave origin to article 17 has now taken on renewed urgency in the context of the health crisis, which has destabilised this situation and fuelled an increase in digital practices.

1. The consultation document, which rewrites article 17, severely jeopardises its effectiveness

In relationship to content sharing services, article 17 essentially aims to re-establish, *“the ability of rightsholders to determine whether, and under which conditions, their works and other subject matter are used, as well as their ability to obtain appropriate remuneration for such use”*¹

Against a context of certain content sharing websites becoming major players in the online distribution of protected content, it addresses the problem identified by the Commission in its impact assessment. To the question of “What is the problem?”, the impact study provides the following summary response: *“Rightsholders have no or limited control over the use and the remuneration for the use of their content by services storing and giving access to large amounts of protected content uploaded by their users”*².

Article 17 was designed to break with the prior situation in which content sharing services could exploit a legal uncertainty regarding the principle of their liability and thereby forgo negotiation with rightsholders and were free to choose the terms by which they would or would not implement preventive measures to protect works, leaving users in complete uncertainty as to the details of these measures and their scope.

The document fundamentally calls this objective into question.

The French authorities draw particular attention to the following grave difficulties:

-The importance attached to observing exceptions can in no way justify a reversal of the logic of article 17.

The primary aim of article 17, as has been reiterated, is the re-establish the control held by the author, based first of all on his or her prior authorisation. The importance rightfully attached by the directive to the exceptions, notably in paragraphs 17§7 and 17§9, can in no way counteract this objective. Article 17 pays great attention to the balance of fundamental rights and, as has been reminded, entails major beneficial advances for users. It nevertheless remains clear that as a result of its overall economy, in the event of a dispute, exceptions are to be taken into consideration in the context of the complaint and redress mechanism.

An interpretation imposing continued online availability of certain contents, without the consent of the copyright holder, because they are perceived by users of services as *“likely to be legitimate”* due to being potentially covered by an exception introduces a reversal which has no basis in the text.

Any such reversal, carrying disproportionate practical consequences, as will be seen, would run contrary to the preventive nature of copyright reiterated by the Court of justice, and the objective of a high level of protection for authors. Furthermore, it would show disregard for the general rule according to which any derogation to a rule must be subject to a strict interpretation, reinforced here by the in application of the three-step test

¹ see recital n°61.

² Page 137 of the impact

- The proposed system draws on unworkable concepts, which lack legal basis and radically compromise the effectiveness of preventative measures.

By way of support for the ex-ante consideration of exceptions, the document introduces two completely new concepts: that of “*likely to be infringing content*” and “*likely to be legitimate content*”.

These notions lack any legal basis, either in directive (UE) 2019/790 or in copyright law as a whole. They carry major legal uncertainty, as the consultation document is seemingly incapable of explicitly detailing how such criteria would work. It is worth reiterating that by its very nature the field of application for exceptions calls for case by case appreciation, in order to reflect the type of content in question and its usage; it therefore cannot be addressed as part of a systematic approach and *a priori* as proposed by the Commission.

The sole example provided by the Commission services confirms as much. Indeed, if as described in the document, it is possible that the use of short film extracts in a commentary video format, or even image extracts used as part of “memes” could constitute exceptions, this qualification can only be made on a case-by-case basis: it calls for *in concreto* evaluation, which could in no event be systematised.

It would be erroneous to maintain, as the document does, that the newly-proposed concepts will not have a legal impact.

Through the *de facto* creation of a new, broadly expanded, field of application for exceptions, and the simultaneous restriction of unauthorised acts of sharing likely to be subject to preventive measures, the recommended approach would radically compromise the effectiveness of article 17.

In fact, under the proposed system, certain infringing contents would remain online solely on the grounds of a random plausibility of legality, and this despite the rightsholders providing the “*relevant and necessary information*” to remove their availability. The highly random outcome of applying an exception would subsequently paralyse the effects of copyright law. The instructions provided by rightsholders as part of the “*relevant and necessary information*” would be purely and simply cancelled and replaced by “*technical parameters*” on the basis of which the likely infringing or legitimate nature of an item of content would be presumed.

Thus, while article 17 was designed and drafted with a view to strengthening the ability of rightsholders to decide on the principle of and conditions under which their works are used, the document under consultation proposes a system within which their right of authorisation would be denied due to the highly random plausibility of legality, judged against very unclear criteria, absent from the directive and devoid of legal relevance. Concerning the duration of the reuse of content being viewed as a possible “*technical parameter*”, it can be recalled that the Court of justice recently reiterated, for instance, that infringement of an exclusive right could notably consist of the reuse, for recreational purposes, of content with duration as short as 2 seconds (Pelham case C-476/17).

The fact that, when the plausibility of legality is claimed by the platform, the debate surrounding the legality of an act of content sharing can finally be ruled upon in a way favourable for the protection of copyright, at the conclusion of a process burdening the copyright holder, and the outcome of which is the reverse of that set out by the directive, is of no corrective worth. Until the conclusion of the process envisaged by the document, some items of infringing content will remain online and the rightsholder will again have to provide notification even where he or she has already supplied the “*relevant and necessary information*” required by the directive.

The result would therefore be an aggravation of the burden on rightsholders where instead the objective is to strengthen their standing.

The proposed system would also present substantial legal uncertainty for online content sharing services, as in certain cases these services would be expected to leave unauthorised content online, despite relevant and necessary information being provided by rightsholders for its blocking. Under article 17, any service not undertaking to make its best efforts to block or swiftly remove infringing content despite relevant and necessary information being provided by rightsholders would thereby become liable.

The establishment of criteria which are vague and likely to discourage online platforms from taking out licenses specified by the directive to cover their acts of sharing, would also have a prejudicial effect on users.

- **The statement according to which the obligation to take preventive measures solely becomes applicable once the objective of concluding licenses can no longer be achieved also lacks any legal basis.** No time line is set out under article 17 for the conditions which the services must meet to discharge their own liability in relation to unauthorised content. It is therefore perfectly conceivable that while negotiating a license with the service, the rightsholder could provide the relevant and necessary information to prevent the presence of unauthorised content. By its very nature, this element would also support the swift conclusion of licenses by the platforms wishing to provide public access to the work in question.

- The French authorities lastly point out that if the proposals of the Commission services were to be followed, the situation of rightsholders not wishing to conclude licenses could be particularly negatively affected.

On the one hand, they would derive no substantial benefit from any clarification of service liability under copyright law to the extent that they do not wish to conclude a license with the services in exchange for remuneration - it being their contractual freedom as reiterated by the directive. On the other hand, they may have to accept the reduced functioning of content recognition tools in relation to certain forms of usage which they currently enjoy. As of 2017, in relation to measures which did not take exceptions into consideration, the Commission noted that: “*in the field of copyright, automatic content recognition has proven an effective tool for several years in the domain of copyright law* »³ and called for the use of these tools.

2. The French authorities support the proposals of the document insofar as they pursue the objective of preserving legitimate uses but recall that this objective could be achieved via means that are much more proportionate to the challenges at hand and respectful of the provisions and spirit of article 17

Content sharing platforms, which have profoundly altered online uses, are formidable content access tools.

By establishing the obligation of services and rightsholders to collaborate, article 17 should contribute to the creation of an environment of trust and security between rightsholders and online sharing services where, simultaneously, a more effective prevention of unauthorised content is enabled and the conclusion of agreements guaranteeing public access to ever richer and more diverse content is supported.

The concern to maintain the benefit of existing exceptions and other legitimate uses must find its response in the implementation of the new complaint and redress mechanism, which represents a major advance. It involves ensuring the full effectiveness of this mechanism, part of which is a human review, and must also be completed by an impartial dispute resolution mechanism.

Furthermore, guidance could be used to raise awareness among rightsholders of the benefit of exploring new forms of uses, in particular by using the management rules permitted by the content protection tools deployed by platforms. As previously illustrated, particularly by the detailed analysis of uses and technologies carried out at the request of the French authorities, these tools enable content availability which goes above and beyond exceptions and yet remains compatible with the objective set out in the article 17 text insofar as this availability is fully authorised and controlled by rightsholders.⁴ The French authorities consider that greater transparency where these management rules are concerned could also be encouraged.

More broadly, the guidance could encourage the conclusion of detailed license agreements. The French authorities also note with interest the suggestion of examples of contract models which could be used within the framework of directive implementation, it being understood that where collective licensing could be considered for the implementation of article 17 alongside individual licensing, it could never be imposed upon the rightsholder. They also note with interest the suggestion of implementing mediation mechanisms at a national level to support the conclusion of any such licenses as well as the proposal to enable exchanges of information on the licenses concluded between platforms, rightsholders and users. They are open to the Commission services invitation to undertake detailed reflection on a potential mechanism to sanction abuses in the implementation of the possibilities offered by the directive, particularly regarding individuals incorrectly claiming ownership of protected content.

³ Communication Tackling illegal content, <https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content—online-towards-enhanced-responsibility-online-platforms>.

⁴ The French authorities remind the Commission that, out of a desire to facilitate the implementation of article 17 on a detailed analysis of forms of usage, technology and stakeholder perceptions, they carried out and published a joint study by the Higher Council for Literary and Artistic Property on the distribution of work and the protection of rights online and the National Film and Moving Image Centre. Released under the title “Towards an effective application of copyright on sharing platforms - Best practice and proposals concerning content recognition tools”, this study is available in French and English on the site: <https://www.culture.Nouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur—de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSP> LA-sur-les-outils-de-reconnaissance-des-contenus—protèges-par-

In order to optimise cooperation between platforms and rightsholders, the French authorities hope the Commission is to provide examples of concrete and documented elements enabling greater collaboration between platforms and rightsholders notably concerning the relevant and necessary information required from rightsholders, the available and effective tools by content type as well as avenues for improvement. Furthermore, they deem **the transparency imposed on the services under article 17, notably in relation to rightsholders, to be essential**. In this respect they draw attention to the fact that, in this field, as in other digital areas, there exists a situation of informational asymmetry between digital platforms and their contracting parties. As a consequence, the services should undertake to provide the information useful for comprehensive understanding of the functioning and deployment of the tools implemented by them to prevent the availability of unauthorised content and to this end guarantee the optimal and timely functioning of said tools.

The French authorities will carefully consider stakeholders' responses to the Commission consultation and are open to continued discussions so that future guidance may play their concrete technical role with regards to the correct application of article 17.

They strongly urge the Commission to conserve the operational and targeted nature of the article, based on best practices, and mention concrete examples of cooperation wherever possible. The interpretations and legal analyses which lack basis in the directive text should be removed, including the idea that the right of communication to the public at the heart of article 17 would be a *lex specialis* in relation to article 3 of the directive 2001/29/CE or the statement according to which the complaint mechanism detailed by this article would be subject to the law of the country of origin. In this case, the above interpretation would result in greater misunderstanding as the aim of the complaint mechanism is to enable the user to invoke usage which is hampered but nevertheless legitimate from the copyright perspective and that this issue of copyright is not subject to the country of origin principle due to application of the E-commerce directive. By the same token, they deem it appropriate to avoid any risk of confusion regarding the fact that, pursuant to directive (UE) 2019/790, co-legislators only wished to make certain specific exceptions set out in directive 2001/29/CE obligatory.