

Consultation related to the European Commission's future guidance on the application of article 17 of the Copyright in the digital single market directive

Non paper from Croatia, Denmark, France, Greece, Italy, Portugal and Spain

Article 17 of the Copyright directive in the digital single market is the result of long political negotiations and rests on a delicate balance between the interests of rightsholders, users and online content sharing services. As the Commission plans to adopt its guidance on the application of article 17 soon, we outline how paramount it is that this article is applied in compliance with the objective, the provisions and the delicate balance which underpins article 17. We are therefore confident that the future guidance will facilitate the concrete application of article 17 while preserving such core elements.

With article 17 of the directive (EU) 2019/790, the European Union has adopted an innovative, forward-looking and balanced piece of legislation which aims at ensuring that copyright applies online, and that creators and creative industries are reinforced vis-a-vis online services that have become very important distributors of contents.

As such, this article will play an essential part in ensuring that copyright can, in the future, still play its role as an incentive and a reward for creativity. By contributing to create a level playing field between the various players giving access to protected content, it will also bring more fairness to the digital single market: a clear regime will now apply to content sharing services with compete with traditional online content distributors.

Under this regime, absent an agreement from rightsholders, content sharing services will be required, in particular, to make their best efforts to prevent the availability of unauthorized works that rightsholders have pre-identified. Together with the clarification that copyright applies to the activity of such services, the preventive measures, which are subject to a proportionality test and are not required from starts ups, are a core element of article 17.

At the same time, article 17 rightly fully takes into account the interests of the users. Certain exceptions to copyright only optional for member states now become mandatory in the context of article 17, new complaint mechanisms will have to be set up by services and member states to enable users to file a complaint in case their upload is removed or blocked by the service for reasons not justified from a copyright law perspective. In addition, users will automatically benefit from licenses entered into between rightsholders and online services. All these elements are entirely new and benefit to the users.

Article 17 is key for the creative sector and cultural diversity in Europe. This sector has been dramatically impacted by the Covid crisis.

It is therefore all the more essential that article 17 is applied in a manner that is compliant with both its objective and its provisions.

Some orientations taken by the Commission in the document subject to the targeted consultation open to the participants to the stakeholder dialogue on article 17 raise serious concerns. By proposing new concepts such as "*upload likely to be legitimate*" and suggesting, based on such concept, a *modus operandi* for the application of article 17 where instructions from rightsholders would simply be set aside in the context of the preventive measures, the document exceeds the purpose of the guidelines to be adopted by the Commission and raises very serious issues.

The negotiation of article 17 has lasted 2 years and half and generated much discussion and debate. Proposing new concepts absent from article 17 and more generally from the copyright acquis, and entrusting these concepts with a role that will impede the functioning of preventive measures is not only extremely confusing in light of the objective and the provisions of article 17, it is also extremely damaging.

Only if the political and legal agreements negotiated and voted by the co-legislators are fully preserved, will article 17 be able to secure a clear and trusting environment where platforms and rightsholders can smoothly collaborate, users can benefit from the new advantages introduced by the directive and rightsholders are truly and effectively encouraged to grant licenses on a voluntary basis.