

ACT RESPONSE TO TARGETED CONSULTATION ON ARTICLE 17 OF THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

I. SCOPE OF SERVICES COVERED BY ARTICLE 17

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 element of the definition of the online content-sharing service provider falling within the scope of article 17 (OCSSP) are the following:

- “Storing and sharing” concept
- Quantitative aspect (concept of “large amount of copyright-protected content”)
- Lucrative aspect (concept of “profit”)
- Active role aspect (“by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it”)

The quantitative aspect is the only element of the definition that is highlighted by the proposed guidance. The propose guidance should be amended in this respect, notably in order to highlight the importance of the other aspects such as the active role as originally provided in the European Commission’s proposal (COM(2016) 593 final), which stated that “In respect of Article 14 (Directive 2000/31/EC), it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor” (Recital 38 EC Proposal). Furthermore, the active role should be understood in a broad sense: it should make reference to the commercial exploitation OCSSPs make of users’ data to optimise their services and propose targeted content and advertising.

Since the adoption of the Directive, we can notice a growing trend consisting in the facilitation of “off- platforms infringement”. One of the big issues with the major platforms as YouTube or Facebook now is not just the illegal content stored on their platform, but material posted on their platform that directs users to go elsewhere to get the illegal content (e.g. by following links in the videos, or in the comments, to streaming websites). Today the indirect access to illicit contents via links prevails on the consumption of video stored on platforms¹.

We consider that the main objective of article 17 would be missed if its implementation would simply displace the issue of copyright protection and related rights rather than solve it.

As a consequence, we suggest that the importance of element of the definition of the OCSSP relative to the “storing concept” be put into perspective compared to the other elements of the definition, in order to give a useful effect to article 17 and to ensure a high level of protection of copyright and related rights.

II. AUTHORISATIONS (Art. 17 (1-2))

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.

¹https://hadopi.fr/sites/default/files/sites/default/files/ckeditor_files/1911978_HADOPI_L%20ESSENTIEL_17.pdf

We welcome that the guidance specifically sets out that: *“rightholders are not obliged to grant an authorisation to online content sharing service providers, as explained in recital 61”*.

It should be highlighted that, given the principle of contractual freedom specifically recalled in the DSM Directive (Recital 61: “However, as contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements.”), in no event the right holder should be forced to adhere to forms of collective licensing.

We caution against any application of an extended collective licensing (ECL) or blanket licensing arrangements that are not compatible with Art. 17 as they interfere with the normal exploitation of the rights. Any ECL arrangements should ensure it passes the three step test. Further ECLs are not designed to grant a cross-border license for OCSSPs.

Obtaining licences from audio-visual rights owners is simple due to rights being unified in one owner. Extended collective licensing is bad commercial and cultural policy for the audio-visual sector. Broadcasters have an interest in maintaining direct licensing, without the need for collective management. As such, there is no general licensing policy in relation to OCSSPs. It is important that the content is not illegally uploaded on OCSSPs. If it is, it should be taken-down and needs to stay-down.

As outlined by ACT (and its members), during the Copyright review discussions and subsequent dialogues, rightholders take different approaches to the authorisation models foreseen. This stems from the fact that rightholders each have different exploitation models to allow for sustainable refinancing and distribution.

Granting of authorisations for uploads by users is the exception not the rule for Broadcasters. The primary purpose of Broadcasters interaction with OCSSPs is to ensure their content is taken down so as to preserve the value tied to the exclusivity of the work. Exclusivity and contractual freedom are the cornerstone of the audiovisual sector. Audiovisual distribution depends on exclusivity to ensure the value and attractiveness of programs and content is upheld.

Only a minority of works are in practice licensed directly on platforms; and few licenses are granted for uploads by users. Possibility to block, track or monetise the content takes into account a number of factors including exclusivity. Those decisions are individual and independent Members’ decisions and should remain as such.

The proposed guidelines should highlight that the authorisation, if any, granted by broadcasters in order to promote and monetise the content uploaded from their own account (e.g. a YouTube Channel operated by a broadcaster) should never be considered as an authorisation in the meaning of article 17 which cover acts carried out by users of the OCSSP, unless it is specifically and expressly provided.

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?

As stated in previous questions, granting of authorisations for uploads by users is the exception not the rule for Broadcasters. As such, prevention of upload rather than authorisation is the key issue for ACT members. In such (rare) cases where authorisations are granted, any exchange of information will necessarily involve the requirement for OCSSPs to deploy Content Recognition Technologies (CRTs) due to the sheer volume of content across all types of copyright protected works.

So far, only a few platforms have developed their own CRTs (e.g. *Content ID* for YouTube, *Rights Manager* for Facebook). The (many) others do not have recognition tools (e.g. Twitter, Periscope, Twitch) and rely on a notice and take down system. Further, each OCSSP has different requirements to operate against infringing copyright protected content.

The European Commission may support the development of open and interoperable broadcast watermarking solutions, enabling all OCSSPs to access the relevant and necessary information about broadcasters' content. However this should not mean that right holders should be required to notify ownership of rights and/or authorisations granted via a centralised database. Moreover, there should be no presumption of authorisations and express authorisation by a rightholder should be needed.

III. SPECIFIC LIABILITY REGIME UNDER ARTICLE 17

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

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.

To establish if an OCSSP has done its best efforts to obtain an authorisation the negotiation must be carried out in accordance with the rightholder's business model, the best efforts aren't met when the OCSSP tries to impose his remuneration model. The OCSSP's "best efforts" entail good faith and willingness to negotiate on the basis of the licensing terms generally applied by the rightholder. The proportionality principle only requires that, in establishing the price, the rightholder considers the nature and type of work and the scope of its use on the OCSSP's service.

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?

As far as the value of copyright is concerned, it does not make any difference if a big or a small service is dealing with copyright content, or if the latter is popular or less common. The protection and value of copyright does not make such distinctions and should not do so – as it would diminish its value.

Based on the assumption that EU Law imposes due diligence to all OCSSPs, smaller OCSSPs will have to prove they have tried to negotiate fair licenses with reasonably identifiable rightholders (in line with the above: "those who are not easily identifiable by any reasonable standard"). It is customary, by law or by contract, for unification/centralisation of rights to take place in audiovisual production; i.e. all rights reside in the producer's hands (one stop shop). As such, relevant rightholders are easy to identify.

The fact that a piece of content is less prevalent on the service does not exclude the possibility that the availability of such content on a smaller OCSSP, where this has not been authorised, may be extremely damaging to a rightholder. Hence the need for the use of CRTs to ensure the damaging content can be identified.

Many interventions of previous stakeholder dialogue meetings (e.g. from technology providers like Videntifier, Audible Magic, etc. and from OCSSP(s) themselves, like Seznam) have highlighted that content recognition technologies are affordable for all OCSSPs, regardless of their size, and can detect a variety of content.

To put in place content recognition technologies in order to effectively avoid the availability of unauthorised content online is simply the cost of doing business for OCSSPs, whatever their size or prevalence of content on their platform. We should not have lower standards for illegal content online than for illegal products offline².

Some technologies' service fees depend on the size of the platform. Smaller platforms pay less (e.g. a few hundred euros a month). There is no need for a platform to develop its own technology and the technical implementation is neither time consuming nor difficult. The technology is mature to fit all platforms and types of contents. Technology providers are used to adapt the price of the technologies depending on the size of their business

² Main takeaways from fourth stakeholder dialogue (16/12/19): Czech platform Seznam and technology provider Audible Magic made the point that even smaller OCSSPs can use content recognition technology at an affordable price

partner. Furthermore, the market has developed in the last decade and will continue developing in the near future, increasing the competition to the benefit of everyone.

There are many different technologies in the market. Those technologies provided by technology providers are much more effective than those which are put in place directly by some OCSSPs. Many of these technologies are not available to all of our members. Need for a case by case analysis because technologies and practices are different.

Finally, best efforts can only be evaluated on a dynamic case by case basis and it is the role of the national courts (and ultimately the European Court of Justice) to determine what constitutes best efforts.

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.

The principle of proportionality should apply to the benefit of rightholders in their interactions with OCSSPs.

Economic conditions proposed by OCSSPs, which, most of the time, consist in a non-negotiable 50/50 advertising share revenue for exploitation of a broadcaster's audiovisual content are not compatible with profitability conditions of premium content.

OCSSPs' suggestion to adopt licensing schemes based on revenue sharing models shall not be considered "best efforts". This is clarified in Recital 61 of the Copyright Directive:

"Those licensing agreements should be fair and keep a reasonable balance between both parties. Rightholders should receive appropriate remuneration for the use of their works or other subject matter. However, as contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements."

Further, the condition to make best efforts to obtain a license should not be abused by OCSSPs (e.g. as an obligation to enter into licensing negotiations) and lead to delays in take down or other kind of behaviours from the OCSSP to force broadcasters to give a license. Safeguards should be provided against a possible abuse of subparagraph (a) of Art. 17.4 as either an obligation to license or an obligation to enter into licensing negotiations.

Art. 17.4(a) should not lead to delays in the application of subparagraphs b) and c) by, for instance, stating that the "best efforts to obtain an authorisation" can be a mere formality in situations where the rightholders do not usually want their content to be available on OCSSPs' services, or that it is not applicable in such cases.

Should be noted that a lack of reply from a rightholder cannot be deemed as an implied authorisation. Nor does the lack of mutual consent on terms and conditions. It shall – in the contrary – be deemed to be a refusal of the service provider's offer.

2. 'BEST EFFORTS' TO AVOID UNAUTHORISED CONTENT (Art. 17(4)(b))

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.

Best efforts is a dynamic concept that will change over time according to the state of the technologies and uses. It therefore implies regularly updating any assessments made in order to take these factors into account. In order to perform this assessments, a regulator could be appointed at a national level.

Taken into consideration the immense amount of copyright content being uploaded every second, there is no other way than using content recognition technology in order to ensure unavailability of specific unauthorised professional content. The best manageable way to detect unauthorised professional content is by implementing fingerprints in the content files or watermarking, which grants a stronger protection of AV content as it is embedded in the work itself (while fingerprinting is a mere copy/ impression of the work stored in a database)³.

To this end, the following should be highlighted as integral parts of achieving best efforts:

- All OCSSPs should implement Content Recognition Technologies (CRTs) as standard. This is the cost of doing business for OCSSPs, as is the case for Broadcasters today when clearing rights for use of content they do not own. The stakeholder dialogue has demonstrated that such solutions are available at reasonable cost for all types/sizes of OCSSPs. By the way, the recent French study from CSPLA, HADOPI and CNC entitled *“Towards more effectiveness of copyright law on online content sharing platforms: overview of content recognition tools and possible ways forward”* showed that different kinds of CRTs should be combined (e.g. fingerprint solutions with watermarking solutions with computer vision solutions...) to reach anti-piracy objectives.
- CRTs must constantly be adapted to tackle different methods of circumvention implemented by bad faith users to evade detection (e.g. manipulating the quality and technical parameters of the video, slowing down the sound or the image, inversion or partial cutting of the image). These adaptations should be notified to rightholders and permanently controlled by a public authority (at national or European level).
- Algorithms of content recognition technologies should be transparent for rightholders and for public authorities (at national and/or European level) with no possibility for OCSSPs or technology providers to oppose business secret to public authorities. OCSSPs or CRT providers should well document the source code and explain it in such a way as to facilitate understanding of the algorithm, measure its efficacy, check that they do not include permanent or temporary pro-piracy bias and that they are deployed in the same manner for all users. Without these transparency principles, OCSSPs could manipulate at any time the efficiency of the CRTs they use and/or the perimeter of users uploads covered.
- To limit potential conflicts of interest, the guidance may wish to require that the OCSSP has an “arm’s length” relationship with the company that owns the CRT; i.e. the OCSSP should not own the CRT, or at very least commit to ensuring a strict separation between the information gathered by the CRT and other unrelated business units in the OCSSP
- OCSSPs should be responsive and act immediately, in particular, special consideration should be given to the protection of live content. Since OCSSPs have been taking advantage of the DMCA system via “non-expeditious” removal of the reported content, they should be required to undertake specific commitments with reference to the time needed for the removal of the infringing content
- In addition to information on the time for processing, OCSSPs should also communicate to rightholders information on actions taken as well as information on how the actions are effective regarding closed, private and secret groups that rightholders cannot monitor
- Content shouldn’t stay online following a counter-claim, unless the original claim is directed at content uploaded by a trusted commercial uploader. This is to ensure that take downs do not unduly penalise legitimate commercial uploaders that are subject to an incorrect copyright claim (eg CRT is not aware of contract allowing content to be used for online exploitation) or an oversight (clearance existing for TV broadcast but not for online)
- The user’s attempt to upload infringing material shall be sanctioned, including via the termination of the user’s account by the OCSSP if the user is manifestly seeking to distribute infringing material with no track record of seeking proper authorisations
- All OCSSPs should make available to all rightholders their CRTs and take down tools, regardless of whether agreements with rightholders are in place. In fact, OCSSPs have been preventing smaller rightholders from

³ CSPLA mission on the tools for the recognition of content protected by online sharing platforms: state of the art and proposals

accessing this technology, thus making it more difficult or impossible for them to effectively protect their content on these services⁴.

- More transparency and cooperation from OCSSPs is required, particularly as regards contact information for OCSSPs employees responsible for such matters.
- Minimise the costs and administrative burden for rightholders: less information required to submit reports of infringement.

On top of the above-mentioned considerations OCSSPs fail to adhere to “best efforts” when, prior to receiving a notice for the violation of exclusive rights, they fail to respect the following steps:

- (i) remove the flagged content from their service, regardless of who is the user/uploader;
- (ii) prevent the re-upload – in whole or in part – of the same work on their platform, regardless of who is the user/uploader;
- (iii) disable the account of the user/uploader if user is demonstrably a repeat offender;
- (iv) prevent the repeat offender, via the data about the user that the OCSSP has available, from creating new accounts; This implies for the OCSSP to implement a meaningful “Know Your Customer” procedure to verify the identity of uploaders and keep the information on file. Otherwise OCSSP would not be placed in a situation where they can effectively ban repeat offenders.
- (v) block the user/uploader from receiving any direct or indirect transfer of money related to the infringing content;
- (vi) make available to the legitimate rightholder proportionate revenues directly or indirectly related to the presence of the infringing content on their service;
- (vii) in accordance with the applicable legal framework, provide the rightholders with the identifying data it has about the infringing user.
- (viii) A confirmation of receipt should be sent to notice providers to avoid that the latter has to check manually whether his/her request has been followed.

Proportionality principle should not apply only to define less measures for smaller service providers, it should also take into account financial and artificial intelligence capacities of the group which owns the OCSSP. For example, best efforts should be evaluated on a dynamic case by case basis to determine what constitutes best efforts for an OCSSP, regarding its financial capacities and ability to develop artificial intelligence tools to fight against piracy.

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)?

What is relevant and necessary will always evolve. It is a case by case assessment. Constant technological developments to ensure greater accuracy of CRTs should currently be seen as ‘necessary and relevant’.

As such the notions of “relevant and necessary information” and “sufficiently substantiated notice” should not be left to the interpretation of the OCSSPs, but rather subject to an objective assessment. For the broadcasters, the title of the program and the broadcast date is the most relevant and necessary information⁵.

A lack of reply from a Broadcaster (if an OCSSP requests an authorisation) should not be deemed as an authorisation. Relevant and necessary information should be understood as the minimum information needed to identify a work.

As such, best effort should be understood as a dynamic concept as the technology is constantly evolving to arrive at greater levels of accuracy. Relevant and necessary information should be left to the Courts to decide on a case by case basis. Both the notion of necessary and relevant depend on the specific circumstances. Rightholders have

⁴ US Congress letter sent to Mr. Sundar Pichai on 3 September 2019: <https://www.ipwatchdog.com/wp-content/uploads/2019/09/9.3-Content-ID-Ltr.pdf>

⁵ Based on Italian jurisprudence the title of the work and the BRs logo are enough to identify the work (RTI vs VIMEO: Ruling of the Court of Rome of 10 January 2019)

an incentive to provide relevant and necessary information. We recall that copyright is an exclusive right and there should not be burden of a justification and in contradiction with rights.

The concept of “necessary and relevant” must be put into context, as does the concept of “high industry standards”, to prevent ex-ante the presence of protected material on the platforms. The information provided shall therefore relate to the type, the public and the size of the service, and to the type of works and other protected subject matter uploaded by the users of the service and to the availability of adequate and effective tools and their related cost for the service provider.

In any event, also without the “suitable and effective means”, OCSSPs must act diligently when clearly illegal material is made available on their services. Timing is critical, particularly for live content that is uploaded without authorisation⁶. This is the minimum standard that shall be expected, and that shall be imposed to all OCSSPs despite the instrument they have available.

Although not directly applicable in the context of Directive 2019/790/EC (which specifically excludes the applicability of Article 14 ECD), it is relevant to take into account paragraph 190 of the Opinion of the Advocate General (C-682/189): “*the infringing character of information can be regarded as ‘apparent’ within the meaning of Article 14(1)(a) of Directive 2000/31 only where the provider concerned has been given a notification providing it with evidence that would allow a ‘diligent economic operator’ in its situation to establish that character **without difficulty and without conducting a detailed legal or factual examination**. Specifically, that notification **must identify the protected work, describe the alleged infringement and provide sufficiently clear indications of the victim’s alleged rights to the work**” [bold added for emphasis]. In particular, footnote 181 of the AG Opinion clarifies that, “*where an unknown user uploads a poor-quality copy, filmed using a camcorder, of a recent theatrical release*”, there is little doubt about the infringement.*

Question 9: Are there any other elements related to the best efforts to ensure the unavailability of unauthorised content, besides those outlined above, for which you think some guidance is needed? If yes, please explain which ones and how you consider the guidance should address them.

The Guidance should bear in mind that current Content Recognition Technologies (CRTs) are not 100% reliable in terms of identifying all protected works and that this impacts the Broadcasters’ ability to protect their exclusive rights. As such, best efforts should entail implementing the latest technological developments to ensure greater accuracy of CRTs.

The Guidance should also acknowledge that such CRTs are expensive for rightholders to operate, and that systems in place should seek to minimise the cost and time burden they place on rightholders through greater interoperability/streamlining/alignment of processes.

Regarding the reliability of CRTs, AV rightholders have underlined the following pitfalls that should be noted as part of ensuring better quality of service, notably:

- Lack of free access to content recognition systems
- AV content has to be “re-edited” by RH
- Different requirements to (reference files) operate against infringing content
- Most current Content Recognition Systems don’t work for content already uploaded (no analysis, or partial analysis, of the previous uploaded stock of materials)
- High % of content still goes undetected or resurfaces at a later date
- There is often a need for manual intervention
- The DMCA claiming systems (and/or removal forms) are often unnecessarily complex
- Fingerprints tools are not available for all platforms and fingerprint efficiency is not homogeneous

⁶ Ikatel case in the Netherlands, case launched by the Premier League in front of the Hague Cort. Ikatel has to respond after 30mns after receiving the notice.

- Content is released immediately when dispute arises, which means unauthorised content is monetised by the user and the OCSSP
- CRTs are mandatory to manage assets on some OCSSPs (eg Content ID) and require that rightholders upload their content to the OCSSP in order to create a fingerprint. Such material is often of a commercially sensitive nature, and rightholders have no knowledge of what other uses the System (or other services of the OCSSP) make use/have access to said content.

Regarding the cost of operating these systems, rightholders have underlined that:

To date, responsibility for finding and removing content from OCSSP platforms has been largely left to rightholders, with resulting cost and resource implications. OCSSPs can and should do much more to find and remove illegal content from their platforms.

Fighting piracy requires significant time and resources which could be spent investing in even more original content. Typical costs entail set-up, interfacing with Broadcaster IT systems, support and human resources to operate. An ACT member highlighted at the Stakeholder Dialogue that for one OCSSP the cost can reach approximately €200K/year.

Costs have to be replicated across each OCSSP where platforms have such systems in place. Claims and conflicts must be managed, which also requires resources. In addition to internal costs, several Broadcasters need to pay significant fees to service providers who work against piracy and monitor content on OCSSPs.

Less efficient platform technical tools leads to more resources mobilised by commercial broadcasters. Where no technical tools are available, the only possible intervention is manual.

Interoperability between tools should be preserved and promoted whilst allowing Broadcasters access to a real time take-down tool. Furthermore, Broadcasters have no control or say in how the platforms develop their CRTs. If systems vary, implementations and administrative work will vary as well.

Finally, the Copyright Directive does not apply to OCSSPs which give indirect access to copyright protected content via 1) hypertext links, or via 2) videos that consist in manual for pirate apps, box or streaming websites. However, indirect access to illegal content via links available on social platforms is a growing trend as they become piracy links directory in addition to offer infringement materials directly.

3. NOTICES SUBMITTED BY Rightholders TO REMOVE UNauthorISED CONTENT AND THE RELEVANT AND NECESSARY INFORMATION TO PREVENT FUTURE UPLOADS (ART. 17(4)(c))

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?

OCSSP often demand too detailed proof of ownership or other information, such as all the URL addresses of the same illegal content.

According to most recent national case law (e.g. in Italy and in Germany⁷), the title of the work in combination with the broadcaster's logo are sufficient to detect illegal content on video-sharing platforms.

⁷ German Federal Supreme Court (Bundesgerichtshof – BGH) GRUR 1030 para. 46 (2013) – File-Hosting-Dienst I; German Federal Supreme Court (Bundesgerichtshof – BGH) GRUR 370 para. 29 (2013) – Alone in the Dark; see for a detailed analysis of the BGH case law Jan Bernd Nordemann 59 (no. 4) Journal Copyright Society of the USA (2012) 773 at 778 et seq.; Jan Bernd Nordemann Liability for Copyright Infringements on the Internet: Hostproviders (Content Providers) – The German Approach, 2 (2011) JIPITEC 37
http://copyrightblog.kluweriplaw.com/2018/06/28/preventive-duties-hosting-service-providers-line-eu-law-comments-legal-perspective-art-13-draft-dsm-directive-upload-filters/?doing_wp_cron=1598613863.4909501075744628906250#_ftn2

Too detailed proof of ownership or other information, such as URL addresses of the illegal content are difficult to provide as well as time-consuming. In the meantime, the illegal content stays online seriously damaging the creative sector.

As such the notions of “relevant and necessary information” and “sufficiently substantiated notice” should not be left to the interpretation of the OCSSPs, but rather subject to an objective assessment.

Some Member State legislations (e.g. France) request that the notice includes “a copy of the correspondence addressed to the author of the litigious contents or website publisher requesting their interruption, withdrawal or modification, or justification that the author or website publisher could not have been contacted”.

Such information is difficult to provide, time-consuming and most of the time irrelevant (e.g. pirate website owners are often hidden from WHOIS registry / infringing streams are often identified with IP addresses and not associated to a website, so only the hosting service provider is known). Again, the illegal content stays online seriously damaging the right holders.

Member States shall thus be prevented from requesting right-holders to detail their notice in a way that exceeds what is requested under EU law.

The notification procedures could be made more effective using the notion of trusted flaggers. This status should be given to holders of IP rights using objective and transparent criteria (the ratio of rightful notifications could be used as a benchmark). Trusted flaggers would benefit from a simplified notification procedure through a specific canal. Therefore, information asked from trusted flaggers should be made minimal.

The removal shall be performed expeditiously. For a violation of live content, the reaction of the OCSSP should be immediate when the notification has been received or at least take no more than 30 minutes.

Question 11: Are there any other elements related to the 'notice and take down' and 'notice and staydown' 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.

Third parties who work for rightholders should also have the possibility to send information and notices. As stay-down system works with CRT, the same obligations about algorithm transparency and permanent technical evolutions should apply to systems related to stay-down measures.

The notice and stay down system is equally important and necessary as the notice and take down system in order to respect the right owner’s rights and prevent illegal usage of professional audiovisual content.

Moreover, the “pre-flagging mechanisms” – as envisaged by the German Ministry of Justice and for Consumer Protection – do not offer practical solutions for notice and take down actions: A pre-flagging of copyright content by uploading users as “legally uploaded” is subject to arbitrariness and legal uncertainty and potentially misuse. If uploading users were able to claim – without any kind of sanction – that they were uploading copyright content legally, although they are aware that they cannot rely on limitations and exemptions, they would probably do so purely as a preventive measure. This would lead to even more problems in practice regarding illegal content online and will not contribute to legal certainty for both uploading users and service providers.

4. SPECIFIC LIABILITY REGIME FOR START-UPS (ARTICLE 17.6)

Question 12: What specific elements of the specific liability regime for “new” services, provided for in Article 17(6), should in your opinion be addressed in the guidance and how?

The 10 million EUR annual turnover criteria shall be calculated in absolute terms, on a global scale.

The guidelines should point out that the limited liability regime is restricted to the new services as defined in Art. 17 (6) and that there may not be added new categories of new service providers that are e.g. still smaller than the new service providers defined in the directive.

IV. SAFEGUARDS FOR LEGITIMATE USES OF CONTENT (Art. 17(7)) and REDRESS MECHANISM FOR USERS (Art. 17(9))

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?

We do not agree with the approach presented above. An approach that would consist of a presumption of legitimacy for very short excerpts would be a radical change with spill-over impact on existing licensing regimes, enforcement practices and a detrimental effect on value. In our view this would provide the OCSSPs with a new de facto safe harbour which they would use to evade their clear obligations under Article 17 when communicating to the public.

Shielding OCSSPs from their obligation to take all measures to ensure compliance as required by law, by seeking to cover every scenario however exceptional or rare in the Guidelines, is both disproportionate and undermines their legal obligations. Clearly this was never the intention of the co-legislators. It is also against the principles evoked by Commissioner Gabriel in her opening remarks to the Stakeholder Dialogue, where the Commissioner insisted that it is not for the EC services to interpret the Directive, this prerogative rests with the Court of Justice of the European Union (CJEU).

In fact, making certain exceptions mandatory under Article 17(7) of the Directive is the result of a carefully crafted compromise to allow certain permitted uses. The approach agreed in Article 17 in this regard is the mandatory complaint and redress mechanism in Article 17(9), which represents a significant improvement for users. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. The guidance cannot be a vehicle to reopen some of the most controversial aspects of the directive.

Right holders have every interest to avoid inappropriate blocking of content, but the instructions to OCSSPs should remain their prerogative, as suggested in the Mochon report (page 126), Dr. Mihály J. Ficsor's publication (see [here](#)), and the ALAI Draft Opinion ([here](#)).

The balancing of conflicting right shall be made always keeping in mind the principles provided in Directive 2001/29/EC. The three steps test, which must be applied when unauthorized uses occur, must be expressly recalled.

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)?

ACT recalls that the Directive's principle objective⁸ is to better the standing of rightholders (via licensing or better enforcement of rights). The content should be blocked/taken down until the rightholder's review and final decision. In the case of obvious good faith of the user, the content will be put again online.

⁸ See for instance Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, p.3: <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>

As such, when the complaint and redress mechanism is triggered, the potentially infringing content should not go up on the platform again. The volume of copyright infringement broadcasters have to deal with is huge while the data shows that the volume of false positives is extremely low. OCSSPs should not encourage users to submit spurious counter-claims.

OCSSPs' pre-treatment of users' claims by artificial intelligence (pre-qualification by context analysis and users' history/track record) would facilitate and accelerate the manual treatment of these claims by rightholders (by reducing the number of claims to be reviewed manually once the complaint and redress mechanism is triggered). The principles and rules of this pre-treatment process have to be discussed between OCSSPs, rightholders and a public authority who is in charge of extra-judicial users' claims treatment if any.

Artificial intelligence can contribute to improve the functioning and performance of content recognition technologies. Algorithms, which are already used for non-copyright protected content, could complement and enhance existing practices. False positives could be integrated within the reference base to help these algorithms to better distinguish what should be recognised and what shouldn't.

Data coming from CRTs could be analysed, in the respect of data protection rules. This would allow OCSSPs to better identify users' history and to prioritise cases requiring human review⁹.

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.

The Copyright in the DSM Directive provides for measures regarding a complaint and redress mechanism - Article 17.9 - in order to guarantee that users could benefit from the exceptions which are mentioned in Article 17.7. Paragraphs 7 and 9 of the Directive are related as paragraph 9 of Article 17 explicitly mentions exceptions. In addition, Recital 70 of the Directive underlines the link between the exceptions and limitations of Article 17.7 and their implementation within the framework of Article 17.9:

"[...] Those exceptions and limitation should [...] be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that OCSSPs operate an effective complaint and redress mechanism to support use for such specific purposes."

The mechanism would allow *"[...] users to complain about the steps taken with regard to their uploads, in particular where they could benefit from an exception or limitation to copyright in relation to an upload to which access has been disabled or that has been removed."*

The complaint and redress mechanism was conceived to address potential issues related to the current use of existing content recognition technologies. In the context of the stakeholder dialogue, it is worth recalling that the number of complaints from users, following a takedown, is insignificant in comparison with the volume of infringing content that is identified and taken down.

Here are some numbers from previous ACT interventions during stakeholder dialogue meetings:

- 0.5% of a broadcasters' fingerprints generates claims from users
- Only 1/20 000 of notices sent by a broadcaster lead to a valid user's counter-claim

Broadcasters rarely initiate legal actions against individual users for infringement. The debate on the so-called "overblocking issue" should be put into perspective. A recent study from CSPLA, HADOPI and CNC¹⁰, entitled "Towards more effectiveness of copyright law on online content sharing platforms: overview of content

⁹ "Towards more effectiveness of copyright law on online content sharing platforms : overview of content recognition tools and possible ways forward", CSPLA, HADOPI and CNC, 29 January 2020, p. 52/53 [Link](#)

recognition tools and possible ways forward”, confirms that only a minority of internet users, 4%, have already had their audio or video content blocked¹¹.

Furthermore, the study states that very often, takedowns resulting from the use of content recognition technologies are not contested and when they are, the reasons put forward only rarely fall under the scope of exceptions¹².

Last but not least, the study also states that the percentage of false positives (i.e. content which is wrongly identified) related to the use of existing content recognition technologies is also insignificant¹³. As specified in the November 2018 Report, 98% of copyright issues on YouTube are handled through ContentID and less than 1% of ContentID claims are disputed. Of these half are due to music issues, the other initiated by advertisers. This rate is similarly very low on other popular OCSSPs.

V. INFORMATION TO RIGHTHOLDERS (Art. 17(8))

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.

Beyond the elements already set out in previous answers, the “most important” information obligation incumbent to all OCSSPs covered by the Copyright Directive should include but not be limited to:

- Information on actions taken to remove the unauthorised content
- Maximum transparency about CRTs functioning and algorithms chosen by OCSSPs for automatic detection (and full transparency for authorities as already mentioned)
- Detailed explanations for what reasons an unauthorised content hasn’t been detected by CRTs (taking in consideration that the occurrence of a “bug” cannot be considered as a valid explanation)
- Information on processing time, i.e. removal time of the content identified ex-post. As OCSSPs have been taking advantage of the Digital Millennium Copyright Act (DMCA) mechanism via “non-expeditious” removal of the reported content, they should be required to undertake specific commitments with reference to the time needed for the removal of the infringing content.
- Number of views of the licensed content
- The number of times the fingerprint has matched with content uploaded by users
- Number of attempts made to upload content previously removed via fingerprint/watermark
- Analytics on users’ videos that have a fingerprint matched with the broadcasters’ content
- Advertising revenues of both the licensed and illegal content uploaded
- Information about the accounts of the user/uploaders and the postal address
- Analytics on users relaying via links or other means pirated content in order to monetise the content.
- Information on how the actions are effective with regard to closed, private and secret groups that rightholders cannot monitor

Question 17: Are there any other elements beyond the ones listed above which should be covered by the guidance? If yes, please explain which ones and how you would suggest the guidance to address them.

¹¹ Ibidem, p. 90

¹² Ibidem, p. 123-124

¹³ Ibidem, p. 3

In the guidelines it could be clarified that the implementation of the DSM Directive does not open up possibilities to provide for additional exemption rules under national law – as currently proposed by the German Ministry of Justice and for Consumer Protection.

VI. OTHER TOPICS

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.

Guidance should encourage Member States to appoint national authorities to play the role of trusted third party regarding

- (i) the monitoring of the efficiency of CRTs (the authority could conduct periodic “stress tests”);
- (ii) the transparency of CRTs algorithms to be able to detect potential pro-piracy bias (for example a false minimum length of detection, a biased detection weighting, etc.), and;
- (iii) the capacity to check that CRTs are running in the same manner on every users.

We are particularly concerned about the approach taken in the unofficial proposal of the German Ministry of Justice and for Consumer Protection (published 24 June 2020) regarding the establishment of a direct remuneration claim for authors/performers vis-à-vis online services that shall be collected and distributed via collecting societies (§ 7 Copyright Service Provider Act) as well as the establishment of a general extended collective licensing mechanism (ECL mechanism) (§§ 51, 51a Collecting Societies Act) . Neither the copyright contract law rules of the DSM-Directive, nor previous EU-Directives in the field of copyright, nor the relevant international treaties (Berne Convention, Rome Convention, WCT, WPPT, and TRIPS, to name just the most important ones), allow collective direct payment to creatives, bypassing their exploitation partners.