

The Consumer Voice in Europe

## BEUC COMMENTS - TARGETED CONSULTATION ON ART.17 OF THE COPYRIGHT DIRECTIVE



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## **BEUC comments – Targeted consultation on Art. 17 of the Copyright Directive**

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BEUC overall supports the European Commission’s guidance on the practical application of Article 17. The main elements provided in the guidance reflect the dual objectives of Article 17: strengthening the negotiation position of rightholders and strengthening the rights of the users.

We nevertheless remain sceptical about certain points and would therefore like to make the following remarks:

### **1. Interplay between Article 17 (4) and Article 17 (7)**

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BEUC supports the clarification by the European Commission that Article 17 (4) must be applied in combination with Article 17 (7) besides the effective complaint and redress mechanism foreseen in Art. 17 (9). The legal value of Art. 17 (7) and its users rights was one of the most debated points during the Copyright Stakeholder Dialogue meetings. Its adequate implementation by Member States will play a decisive role in determining whether the national implementing laws respect the EU Charter of Fundamental Rights.

According to the public consultation, the Guidance document should give indications to Member States that they need to ensure that legitimate content cannot be blocked automatically by online content sharing service providers’ (OCSSP) automated tools in the application of Art. 17 (4). In other words, the European Commission is underlining that the obligation to protect legitimate use established in Art. 17 (7) needs to be applied ex-ante by the OCSSPs and not ex-post during the redress and complaint mechanism.

In practical terms, this means that OCSSPs will not be able to automatically block content that falls under an existing exception or limitation (e.g. pastiche, parody, caricature, etc.), licensed content and content falling in the public domain.

#### **‘Likely infringing’ and ‘likely legitimate’**

Since content recognition technologies cannot take context into account and therefore cannot assess with absolute certainty whether a specific content is a copyright infringement or covered by a legitimate use, the European Commission introduced a distinction between ‘likely infringing’ and ‘likely legitimate’.

In line with what was mentioned in the previous point, only content identified as ‘likely infringing’ can be automatically blocked. Content which is ‘likely legitimate’ should not be subject to automated blocking and should remain available. The distinction between ‘likely infringing’ and ‘likely legitimate’ will be based on technical parameters chosen by the OCSSPs in cooperation with the rightholders (e.g. length/size of third part content used).

First, we welcome the clarification that when it is not possible to determine with a reasonable degree of certainty whether an upload is likely to be infringing, content should stay online while a human review is ongoing.

Second, while BEUC supports the approach and distinction between these two concepts, it is key that the technical parameters used to distinguish ‘likely infringing’ from ‘likely legitimate’ are the result of a fair compromise between the rights of the rightholders and the rights of the users. They should not lead to a de facto blocking of legitimate content.

In this regard, rightholders and OCSSPs must be transparent regarding the selection of these technical parameters. They should – on a continuous basis – make them available to the general public as well as national consumer protection authorities.

### Pre-flagging

The solution proposed by the European Commission seems better suited for certain types of content than others. Several questions remain regarding the application of the European Commission’s strategy to content falling under the public domain, licensed content (e.g. creative commons license) but also content falling under certain exceptions such as in the case of a parody (how efficient can the technical parameters be in the detection of a parody?).

For these uploads, the Guidance document should clarify that Member States should give users the possibility to pre-flag their content as legitimate. Whenever the user pre-flags their content as legitimate (e.g. parody), OCSSPs cannot take down the content without carrying out a human review first.

## 2. Complaint and Redress mechanism

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According to various studies from the UK and US, users take little advantage of existing redress and complaint mechanisms when their rights are bypassed by automated tools. This happens because they are unaware of the existence of such mechanisms, because they take too much effort to use or because the process would take too long to have the deleted content restored. It is therefore of paramount importance that the European Commission’s guidance provides the right incentives to ensure that these tools are more effective.

We are concerned with the reference to the country of origin principle in the context of the redress and complaint mechanism. By referring to this principle established in Article 3 of the e-Commerce Directive<sup>1</sup>, the European Commission’s Guidance document is implying that the redress and complaint mechanism may be subject to the laws of the country in which the OCSSP is established. If this is to be reflected in the national implementing laws, it will work as a major dissuasive element to the use of the redress and complaint tools by the users.

For this reason, the European Commission’s Guidance document should clarify explicitly that, in line with Private International Law rules (including Rome I, Rome II and Brussels I) and Art. 3 (3) of the e-Commerce Directive, consumers should always have the right to go to court in their country of residence and that the law of their country of residence is applied where more favourable to consumers.

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<sup>1</sup> “When approaching Article 17(9) Member States should bear in mind that the obligation on service providers to put in place a complaint and redress mechanism should be implemented in line with the Union law rules on freedom to provide services, including the ‘country of origin’ principle provided for in Article 3 of Directive 2000/31/EC on e-commerce, when applicable.”



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