

Mr Thierry Breton
Commissioner for the
Internal Market

European Commission
Rue de la Loi 200

B – 1049 Brussels

The Consumer Voice in Europe

Ref.: BEUC-X-2020-089

23 September 2020

Subject: European Commission's guidance on the application of Article 17 of the Copyright Directive

Dear Commissioner Breton,

We are writing on behalf of BEUC, The European Consumer Organisation, regarding the targeted consultation addressed to the participants of the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market¹ and to express **our support for the Commission's draft guidance on the practical application of Article 17**. The draft guidance by and large achieves the delicate balance between the affected interests and thus will enable Member States to successfully use their national leeway in the transposition of the most crucial and contested part of the directive.

One of the most important challenges for the implementation of Article 17 is to ensure compatibility with the EU Charter of Fundamental Rights (in particular the right to freedom of expression). As underlined by many scholars and civil society organisations², the Article is compatible with the Charter only if the implementation of the Directive – and thus the Commission's guidance document – respects its multiple objectives. These objectives are not only to strengthen the interests of the rights holders and their (negotiating) position, but also the strengthening of user rights. The goal of creating legal certainty for both service providers and for users for the sharing of online content is also highly relevant.

We are therefore concerned with the attempts by some rights holders to weaken the rights granted by the Directive to users.

As correctly mentioned in the Commission's guidance document, the automatic filtering tools that platforms will have to put in place to comply with the obligations of Article 17 are not intelligent enough to distinguish between copyright infringing content and content which is legally uploaded (such as content falling under the scope of an existing copyright exception). Therefore, unless certain measures like those suggested by the Commission are implemented, there is a very high chance that legal non-commercial videos created by consumers will be prevented from being uploaded.

For example, consumers are used to making family videos, adding popular music and posting them online for their friends and family to watch and comment. This culture of creating and sharing helped make the Internet as popular as it is. If the rights holders' views were to prevail, legal non-commercial uses of content such as this one could be hindered.

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¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

² Recent [paper](#) from vzbv, BEUC's German member organisation.

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We support the aim of ensuring fair remuneration for artists and creators. However, as expressed in the provisions of the Directive, this cannot happen at the expense of users' rights.

In the annex below you will find our detailed feedback regarding the European Commission's draft guidance consultation.

Thank you very much for taking BEUC's views into account. We count on you to make users' rights a central pillar of the Commission's guidance on Article 17.

We look forward to working with you and your services on this topic and remain available for any further information you might require.

Yours sincerely,

Monique Goyens
BEUC Director General

Ursula Pachi
Deputy Director General

C/c:

Ms. Agnieszka Skonieczna, member of cabinet of Commissioner Breton
Mr. Giuseppe Abbamonte, DG Connect, Director – Directorate I (Media Policy)
Mr. Marco Giorello, DG Connect, Head of Unit – I.2. (Copyright)

Encl.: 1

ANNEX

Protecting legitimate uses of content

We particularly support 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 mechanisms foreseen in Art. 17 (9). This means that **the obligation to protect legitimate uses established in Art. 17 (7) needs to be applied ex-ante by the online content sharing service providers (OCSSP) and not ex-post during the redress and complaint mechanisms.**

Member States need therefore to ensure that legitimate content (e.g. content falling under an exception and limitation) cannot be blocked automatically by the OCSSP's automated tools in the application of Art. 17 (4).

Contrary to what has been argued by some rights holders, it is clear from the wording of Article 17 that the measures seeking to ensure the protection of users' rights should not be limited to the redress and complaint mechanisms. If this were the case, it would inevitably mean that content would not be available in the first instance, which is precisely what Art. 17 (7) is trying to prevent.

We also welcome the Commission's **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.** It is key that the technical parameters used to distinguish the concepts of 'likely infringing' and 'likely legitimate' are the result of a fair compromise between the rights of the rights holders and the rights of the users. They should not lead to a de facto blocking of legitimate content. In this regard, rights holders and OCSSPs must be transparent regarding the selection of these technical parameters. They should – on a continuous basis – make them available to the public.

Issues with pre-flagging of content and the redress and complaint mechanisms

While we generally support the guidelines, we remain sceptical about certain points related to the pre-flagging of content and the complaint and redress mechanisms.

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 draft guidance 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. in case of a parody), OCSSPs cannot take the content down without carrying out a human review first.**

Complaint and redress mechanisms

We are concerned with the reference to the country of origin principle in the context of the redress and complaint mechanisms. By referring to this principle established in Article 3 of the e-Commerce Directive¹, the European Commission's guidance document is implying that the redress and complaint mechanisms 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 use the redress and complaint mechanisms available in their country of residence and that the law of their country of residence is applied where more favourable to consumers.**