

EU Directive on Copyright in the Digital Single Market IFJ/EFJ joint position on the implementation of Article 17.

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Brussels 6 March 2020

This position paper is submitted to the European Commission in the context of its Stakeholder Dialogue on the implementation of Article 17 of the Directive on Copyright in the Digital Single Market. The European and International Federations of Journalists (EFJ/IFJ) represent over 320,000 journalists in Europe and 600,000 worldwide, working in print, broadcasting and electronic media. We welcome this consultation and the opportunity to submit this paper, structured around six key points.

1. Cooperation between journalists and online sharing service providers

There is no direct licensing between journalists or authors of press contents and online content-sharing service providers (OCSSPs). To be entitled to remuneration under Article 17, journalists should be rightsholders. In practice, publishers and broadcasters often impose on journalists' contracts that sign away rights, aiming to make the outlet the sole beneficiary, contrary to the purpose of Article 17.

Even where journalists retain rights, as is usual in other sectors, it is virtually impossible for individual authors to cooperate with platforms and protect their works, for example by using YouTube's Content ID.

There are agreements between some OCSSPs and some media outlets, mainly broadcasters. Journalists working for these outlets may receive modest payments directly or via collecting societies, for the use of their works on those platforms. This is the case in France and Belgium.

There should be more transparency on existing agreements, and those receiving revenue from OCSSPs for the use of journalistic works should redistribute a fair share to journalists contracted by them. Journalists should receive fair remuneration regardless of the sector they work in - print or broadcast – or the type of content they produce.

Live streaming is prevalent in journalism and is protected under the Berne Convention, the WIPO Copyright Treaty and national legislations in EU members states. Platforms generating revenue from live streaming should remunerate rightsholders and more efforts should be done to tackle piracy and loss of revenue resulting from it for rights holders and authors.

2. Licensing and management of copyright protected content

Our goal is the fair remuneration of the media sector and its authors, and our focus therefore is on licensing, not blocking. This is in line with the Directive's objective to foster the development of the licensing market between rightsholders and OCSSPs.

Our federations are in favour of umbrella licensing approaches covering a wide variety of contents. National transposition laws, we believe, should explore mechanisms for broad licensing of the uses covered by Article 17. Collective and extended collective licensing should play a significant role considering the vast number of authors of media contents.

At the same time, authors' rights to opt out (for commercial or moral reasons) should be respected and OCSSPs should set up mechanisms for individual rightsholders/freelance journalists to share, protect and generate direct income from their works.

Technical challenges to licensing will vary widely, depending on the platforms' operating models and the recognition tools they have developed for the types of contents they host.

Whilst it is critical to understand how existing tools function and what their limitations are, our position is that platforms should invest – individually or collectively - in tools that allow for remuneration of their use of protected contents. It is also our understanding that tools are constantly improving, highly adaptable and customisable, and that the biggest challenges to licensing are regulatory and monetary rather than technical.

To comply with the Directive's requirements to deploy best efforts to license, platforms should consult and engage in licensing discussions with CMOs in all creative sectors, including the audiovisual sector. There is consensus among authors' organisations and collective management organisations (CMOs), that such steps should be considered minimal, not best efforts to license contents.

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3. Remuneration and multi-level transparency

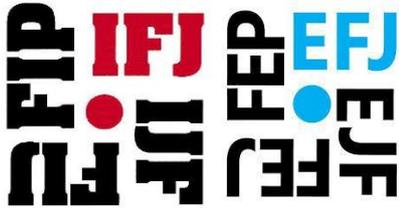
Licensing agreements are highly confidential and opacity prevails regarding data usage, the amounts that OCSSPs pay to outlets and collective management organisations (CMOs), and therefore the calculation of authors' remuneration. Platforms argue that agreements are sensitive business information whose disclosure could have detrimental effects on the business and affect competitiveness. This argument is only partially acceptable, and transparency is central to making the new Directive work and ensuring remuneration is fair, at all levels.

Even powerful rightsholders/conglomerates complain that some platforms reserve the right to define arbitrarily monetisation policies (1) and content posted by some channels that have links with the platforms aren't filtered, resulting in massive losses in revenue for rights holders (2). There is similar criticism from collecting societies. This is because it is not clear how monetisation works.

Paradoxically, corporate rightsholders that are unhappy with the level of transparency from OCSSPs are at the same time concerned with disclosing commercial/confidential information. The question this poses is whether we are dealing with "monetisation policy" that should be transparent and applicable to all in the same way, or "commercial negotiation" which is free and can be kept confidential.

Our Federations demand transparency on data usage, licencing agreements and remuneration calculation. We therefore support the adoption of legislations and mechanisms that:

- a) Ensure platforms share extensive usage data with CMOs and media outlets.



- b) Ensure in turn that media outlets and CMOs in turn share required data with authors and their unions.
- c) Consider all platforms revenues – including advertising and legal data sales – in the calculation of the remuneration due to rightsholders and authors. Page | 3
- d) Establish independent monitoring bodies to oversee usage data, revenues due and paid by OCSSPs, authors' revenue calculation and transparency of rights management.

Images

Some platforms – as YouTube– may argue images are not part of their business model (they say they are “video sharing platforms, not pic banks”), and they aren’t obliged, therefore, to remunerate their rightsholders.

But images/photographs that are protected and used in videos (in high numbers in song videos), should be remunerated, especially since image recognition tools are highly reliable and can detect photos in videos and any content lasting at least 1 second.

In this regard, YouTube’s position that it does not need to remunerate authors of images shows a deep misunderstanding of the Directive and is profoundly discriminatory towards the sector. It entails damaging consequences that undermine the spirit of the Directive.

It is important that OCSSPs respect the Directive and cease to be under the impression that they can continue to set the rules, based on their business model. Images should be paid for by all platforms that use them.

This remuneration is crucial for photographers and visual artists in general. Our federations demand this remuneration and will campaign with the European Visual Artists (EVA) and the Coordination of European Picture Agencies Stock, Press and Heritage (CEPIC), for the enforcement of the Directive on images.

4. Achieving balance between fundamental rights (freedom of expression and copyright): recognition tools, preventive measures, exceptions and limitations.

Recognition tools aren’t new: they have long been used to filter out extreme and unethical contents and to identify and monetise copyrighted work. We share the commonly-accepted view that Notice and Takedown/Stay-down procedures are necessary to removing harmful and infringing contents. They should now ensure protected works cannot be posted without the consent of authors or licensing agreements. Income generated from these works should be paid to rightsholders and authors.

Recognition technology companies and platforms that have developed their own tools all claim their tools are extremely accurate. While it is difficult to obtain verified figures, our take is that existing tools are highly reliable with narrow error margins. Blockage is far more often the result of conflict between several rightsholders (a legal issue) than false positives linked to the tool’s technical accuracy.

In addition, our understanding is that some recognition technologies, such as Videntifier, will soon enter the public domain and may be available for everyone to use, including small European

platforms. The platform says existing technology fulfils the needs of all platforms whatever their size but must continue to be updated regularly as users become more aware, and find new ways to circumvent technology. This mitigates to some extent the concern that small and medium platforms – above the size thresholds put in place by the Directive – may have to bear alone the cost of building tools from scratch.

There is a risk that new preventive obligations in Article 17(4)(b) and (c) may curb freedoms in the context of restrictive licensing models, which is why we support wide licensing schemes. Preventing the illegal use by individual members of the public of protected works to generate income or to gain fame doesn't constitute in our view a restriction to freedom of expression.

The Directive requires platforms, in the absence of a licence, to do their best to prevent content uploads in case of copyright infringement. Content ID for example can block the video, unless the right holder agrees otherwise, without remuneration, or based on collective licensing agreement, or in exchange of all or part of the video's monetisation. It's more complicated in fact because often there are multiple rights holders for a unique broadcast item/fingerprint.

However, the use of efficient recognition technology and clearly defined thresholds is imperative to ensuring Article 17's exceptions and limitations for the purposes of quotation, criticism, review, caricature, and pastiche (Art 17 (7)) are respected. This is particularly important in journalism and raises some concern with regard to press freedom and access to information.

More efficient use of fingerprinting – matching identifying characteristics of copyrighted media to a database – should significantly decrease copyright infringements and improve remuneration of rights holders. But it is not clear which quantitative thresholds and qualitative criteria will be chosen to allow exceptions and limitations and how the task can be met by platforms' current technologies or human resources. These may combine length, proportion, existence of context, comment, harm to primary rightsholder, etc. The debate should therefore shift from the rightfulness of using recognition tools to the definition of clear and agreed thresholds and criteria that will ensure Article 17's exceptions and limitations - and by extension fundamental freedoms - are respected.

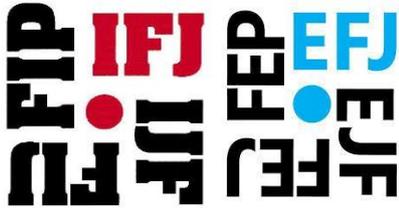
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Although some platforms and rightsholders may argue that the problem is not quantitative (what percentage/duration in a video or third-party protected work can be included and constitute an exception or a limitation?), but only qualitative, it is difficult to see how millions of user-generated content uploads may be made available in compliance with Article 17 (7), without adopting quantitative thresholds. In their absence protected content will be recognised, blocked and submitted to "qualitative" review, which can't be the solution, given the sheer number of daily uploads. For purposes of quotation, comment, review, or criticism, journalists should be able to use seconds or a pre-defined proportion of a protected work without risking their reports being blocked or removed (1) and without losing part or all the revenue their report generates (2).

The danger is that rightsholders/industries that are not interested in licensing at all may adopt very low thresholds (sports events, film producers/Hollywood for example) and require any materials including their contents to be automatically taken down no matter how short or marginal the "illustration" material is. Commenting on a new film release and using a few minutes of a protected film or event to illustrate a debate can lead to blockage.

The question is how to adopt fair procedures that combine quantitative thresholds and human review to ensure both copyright and exceptions and limitations are respected, and how to ensure these criteria are commonly agreed and ensure harmonisation across platforms and countries in the EU.

As highlighted above, our concerns regarding blockage of news contents online are mitigated by the fact that tools, which may vary from a platform to another, are highly adaptable and customisable. Live streaming raises particular concerns in relation to preventing broadcasting of harmful and infringing contents, but here too, adapted tools are being developed.



There is also an assumption that journalistic materials shared by media outlets or media professionals will not be blocked due to existing agreements or the subscriber/user trustworthiness. But we need more clarity on the tools and agreed policies on thresholds and criteria that ensure exceptions and limitations are upheld and fairly applied across. Page | 5

5. Complaints and redress mechanisms.

Despite real concerns that platforms may be overzealous in removing contents or that some of them might not be able to cope - giving rise to dissatisfaction, complaints and exposing themselves to legal action – the dominating feeling is that OCSSPs will adapt, sooner rather than later.

Platforms should seek to simplify complaints mechanisms for users in general and perhaps establish rapid response mechanisms for news contents to avoid curbing free and timely flow of information and ensure fundamental rights are protected. Solving complaints should take days, not hours or weeks.

We are also in favour of establishing of out-of-court settlement bodies as an optional channel for complaints against OCSSPs' conduct in restricting/removing materials and on monetisation policies.

6. Harmonisation

In his written answers to MEPs¹ in November 2019, new Commissioner for Internal Market Thierry Breton, also responsible for copyright, committed to monitoring the implementation of the Copyright Directive in Member States in order to reach harmonised results and avoid fragmentation, a goal he believes will be helped by the EC's Dialogues on the Directive. We support fair remuneration of authors across the EU. This concern isn't specific to Article 17, the transposition of the directive should be harmonised and efforts made to ensure fairness within and between Member States. It is also paramount that transposition laws respect the text and spirit of the new Directive.

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The International Federation of Journalists (IFJ) is the world's largest organisation of journalists, representing over 600,000 members affiliated with 187 unions in 140 countries. The IFJ promotes international action to defend press freedom and social justice through strong and independent unions. It speaks for journalists within the United Nations system and the international trade union movement. <https://ifj.org>

The European Federation of Journalists (EFJ) is Europe's largest organisation, representing over 320,000 journalists affiliated with 79 journalists' organisations in 45 countries. The EFJ fights for social and professional rights of journalists working in all sectors of the media across Europe and is recognised by the European Union and the Council of Europe as the representative voice of journalists in Europe. <https://europeanjournalists.org>

¹ <https://www.europarl.europa.eu/resources/library/media/20191113RES66410/20191113RES66410.pdf>