



September 10, 2020

VIA ONLINE SUBMISSION

Re: Targeted Consultation Addressed to the Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups to support the development of technology entrepreneurship. We appreciate the opportunity to submit these comments regarding guidance on the application of Article 17 of the Directive on Copyright in the Digital Single Market.

Response to 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.

Defining an online content-sharing service provider (CSSP) is critical to getting the scope of Article 17's implementation correct. An overly-broad definition would impose substantial burden, expense, and risk on startups without any real benefit in avoiding or compensating copyright infringement. The definition should focus on CSSPs that host a sufficiently large volume of infringing content relative to non-infringing content and that compete directly with others for the same audience.

Most online platforms experience little, if any, infringement, making it difficult to justify marked increases in their costs to reduce the already-low amount of unauthorised use. A vast majority of platforms receive few notices of claimed infringement (dozens to hundreds a year).¹ But even for platforms that receive more notices, claims of infringement are vastly outnumbered by non-infringing content.² Given the relative paucity of infringement on most platforms, it would be inappropriate to

¹ See, e.g., *The Digital Millennium Copyright Act at 22: What is it, why it was enacted, and where we are now: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Congress at 1:30:44 (2020) (testimony of Professor Rebecca Tushnet, Frank Stanton Professor of the First Amendment, Harvard Law School), available at <https://www.judiciary.senate.gov/imo/media/doc/Tushnet%20Testimony.pdf>; Jennifer M. Urban *et al.*, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. Copyright Soc'y U.S.A. 371, 381-82 (2017) (results of survey in which approximately one third of OSPs reported receiving fewer than 100 takedown notices per year).

² E.g., *Intellectual Property*, Automattic, <https://transparency.automattic.com/intellectual-property/> (last visited Sept. 10, 2020) (Automattic receives approximately 500-2000 takedown notices per month, which is a small fraction of the tens of millions of posts and media files uploaded each month); *2018 Transparency Report*, Shapeways,

require all platforms that host user-generated content to comply with provisions of Article 17, such as obtaining licenses or implementing staydown. All the work required to comply would be wasted because it would not resolve much (if any) infringement.

Likewise, requiring platforms to police all user posts for potential infringement would not serve legitimate copyright enforcement goals. To the contrary, imposing substantial burdens on platforms and opening all posts to scrutiny is, in almost all instances, irrelevant to resolving infringement. Instead, it would create problems for free expression, privacy, security, and the effective operation and growth of innovative businesses. Implementation of Article 17 should try to hone in on additional efforts by CSSPs that could resolve a substantial amount of likely infringement.

Further, Recitals 62 and 63 target services that host large amounts of copyright-protected content *and* “play an important role on the online content market by competing with other online content services . . . for the same audiences.”³ An aptly tailored definition of CSSP should not, for example, merely target any platform that hosts copyright-protected content. That would unhelpfully encompass platforms where creators upload their original works and infringement is scarce.

Finally, Member States must craft unambiguous definitions so businesses know if they are CSSPs. Any uncertainty in Article 17’s implementation will create more cost and risk, incentivize over-blocking of legitimate content, inhibit creativity and free expression, and open doors to litigation.

Response to 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.

Guidance should offer clear parameters defining when users “are not acting on a commercial basis” and “when their activity does not generate significant revenues.” When CSSPs obtain authorisations on behalf of these users, they need a concrete understanding of when and which users (posts) must be covered.

Regardless of how the concepts of non-commercial use and significant revenue are defined, startups will be forced to seek licenses in a vacuum of relevant information. Absent clarity about which user posts must be covered by those licenses, it will be even more difficult for startup service providers to know which rightsholders to approach, the type of license to negotiate, the scope of licensed activities, the

<https://www.shapeways.com/legal/transparency/2018> (last visited Sept. 10, 2020) (Shapeways has over 45,000 shops on its marketplace and only received 291 notices in 2018); *Tumblr Copyright and Trademark Transparency Report*, Tumblr (Jan - June 2019), <https://assets.tumblr.com/downloads/transparency/Transparency-Report-2019.pdf> (Tumblr, in the first half of 2019, received just under 5,000 DMCA notices, and removed 0.000006% of its users’ posts in response); *DMCA Takedown Notices*, Wikimedia Foundation, <https://wikimediafoundation.org/about/transparency/2019-2/dmca-takedown-notices/> (last visited Sept. 10, 2020) (in the second half of 2019, Wikimedia received fewer than 20 DMCA notices).

³ Directive (EU) 2019/790, Recitals 62, 63.

appropriate price, etc. This, in turn, would increase costs and risks for startups and impede efforts to raise capital from outside investors who are unwilling to accept so much uncertainty.⁴

Guidance should also address inherent tensions between the concepts reflected in Article 17(2) and the way CSSPs and their users operate. For example, CSSPs implementing Article 17 will have to consider questions like:

- How to treat a user who posts both commercial and non-commercial content?
- How to treat a user who starts out acting on a non-commercial basis, but his or her online presence or use of the platform evolves to be commercial? And how to respond if that user reverts to non-commercial status?
- Should a CSSP look at annual revenue? And is the only relevant revenue that derived directly from use of the one platform?
- If a user's revenue is seasonal (e.g., an artist who sells Christmas ornaments, a designer who creates fan art around the time of fan conventions, or a wedding photographer), should the CSSP's authorisation on their behalf adjust depending on the season?

In transposing Article 17, Member States should adopt concepts of “non-commercial use” and “significant revenue” with an eye toward reducing unnecessary burdens on CSSPs and the users and creators they serve. Overall, it would be easier to implement a law if CSSPs could avoid scrutinizing each user post's commercial nature and economic value.

Finally, CSSPs will have to collect, record, and closely monitor all of their users (and their posts) to determine which are non-commercial and which generate substantial revenue. That will be a difficult and resource-intensive task, but also creates substantial tension for a CSSP's ability to respect and maintain user privacy and security.

Response to 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?

It is difficult (if not impossible) for third-parties—e.g., startup CSSPs—to track and enforce licenses they are not a party to. It is likewise hard for CSSPs to implement royalty-bearing licenses on behalf of users. Guidance should contemplate alternatives. For example, Member States may learn from the complex U.S. experience with the Music Modernization Act, where central authorities collect information about authorised uses, set royalties, identify rightholders, and dole out payment.⁵

⁴ See, e.g., Matthew C. LeMerle *et al.*, *The Impact of Internet Regulation on Early Stage Investment* 5 (Nov. 2014), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/%20EngineFifthEraCopyrightReport.pdf> (early stage investors report uncertain liability as a significant concern).

⁵ See *The Music Modernization Act*, U.S. Copyright Office, <https://www.copyright.gov/music-modernization/> (last visited Sept. 10, 2020) (summarizing Act, and describing ongoing stages of implementation).

This question implicates CSSP licenses on behalf of users and direct licenses between users and rightsholders.

CSSP licenses covering users: Under a strict read of Article 17(2), CSSPs would either need blanket, lump-sum licenses to *all* copyrighted content or royalty bearing licenses to content actually posted. Without significant restrictions, blanket licenses would be prohibitively expensive and startups would be paying almost exclusively for content that is never posted on their sites. But the alternative—paying royalties on posts that contain copyrighted content—would necessitate filtering all posts to identify which contained licensed work and then calculating royalties.

Guidance should explore distributing or reducing some burden; for example with licenses where someone else, not the CSSP, identifies which posts warrant a royalty.

Authorisation to users: If rightsholders have authorised users to upload and use works, the CSSP does not need a separate authorisation.⁶ In effect this means CSSPs would play a role enforcing licenses, even though they will rarely (if ever) have information about such third-party licenses. Startups will also lack the requisite resources and/or legal expertise. A user and a rightsholder may have a license that permits specific uses, making this assessment complicated. For example:

- A company may be licensed to use a song in one (and only one) advertisement;
- An illustrator may be licensed to create fan art based on a comic; but not licensed to reproduce entire comic books or movies;
- A producer may have a license to use news footage in a documentary, where non-commercial uses are royalty-free but commercial showings require payment.

Liability should be limited when CSSPs make good faith attempts to honor third-party licenses. For example, if a user certifies at the time of upload that it has a license and the post is within the scope of the license, the CSSP should not be liable. Otherwise, CSSPs will take down posts in ways that deprive users and rightsholders the benefit of their bargains, as well as stifle access & legitimate speech.

Response to 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.

Setting the bar for best efforts too high would expose startups to unreasonable obligations with little upshot for resolving infringement. Assessment of best efforts should also account for substance. Otherwise, rightsholders will be emboldened to seek abusive license terms from startups, for example those that are unduly expensive or improperly restrictive.

⁶ Directive (EU) 2019/790, Recital 69.

Especially in view of the relatively low volume of infringement, CSSPs should not be forced to take undue efforts to obtain licenses.⁷ CSSPs cannot be expected to find every rightsholder to negotiate a license. That is such a daunting task many would be unable to comply. And when CSSPs are unable to comply, users and creators will lose access to platforms—and smaller ones with unique offerings would have the hardest time competing.

Assessment of best efforts should also embody balance and fairness, promoting a level playing field. Traditional rightsholders often wield disproportionate leverage. Even under the U.S.'s safe harbor framework, rightsholders have used their power and wealth to drive startups into bankruptcy or acquisition.⁸ Likewise, efforts to foster fair essential licenses often fall flat, with wealthy rightsholders preserving power to the detriment of competition and innovation. For example, performing rights organizations in the U.S. have been under consent decrees for decades due to concerns over their market power.⁹ And determining fair and reasonable royalties for standard essential patents is the subject of substantial litigation where rightsholders can use their power to charge monopoly prices.¹⁰ Similarly, smaller platforms trying to negotiate licenses on their users' behalf have experienced other difficulties. For example, some rightsholders seek editorial control over user posts, trying to use license negotiations to get power over other creators outside the bounds of copyright law.

Startups should not be forced to capitulate to wealthy rightsholders' demands in order to show best efforts. If rightsholders hold up negotiations (or refuse to come to the table) or demand unreasonable license terms, startups should be allowed to walk away and still demonstrate best efforts. Otherwise, rightsholders would have an even greater upper hand in negotiations to coerce startups into problematic licenses.

⁷ See *supra* response to question 1.

⁸ For example, startup video streaming platform Veoh launched in 2005 and was sued by Universal Music Group in 2007. That case was not resolved until 2013. UMG ultimately lost the suit, with the appeals court confirming that Veoh was operating within the protections of the U.S. safe harbors (and was using filtering technology that went above and beyond the notice-and-takedown requirements). But while that suit was pending, Veoh filed for bankruptcy. This was not the only large rightsholder group targeting Veoh around that time. See, e.g., Emily Chasan, *Web Video Service Veoh to Liquidate, Founder Says*, Reuters (Feb. 12, 2010), <https://www.reuters.com/article/veoh-bankruptcy-idCNN1216366120100212> (quoting founder saying “[t]he distraction of the legal battles, and the challenges of the broader macro-economic climate have lead to our Chapter 7 bankruptcy.”); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013)(also explaining that Veoh had adopted hash filtering, which “automatically disables access to any identical videos and blocks any subsequently submitted duplicates”); Joseph Parish, *Universal Loses DMCA Lawsuit Against Veoh*, The Verge (Dec. 22, 2011), <https://www.theverge.com/2011/12/22/2652889/universal-dmca-lawsuit-veoh-affirmed> (covering Veoh's first Ninth Circuit victory and bankruptcy); *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (in another case filed by adult film producer, court held that Veoh met its burden of proving its entitlement to the safe harbor).

⁹ See, e.g., *Antitrust Consent Decree Review - ASCAP and BMI 2019*, U.S. Dept. of Justice (Sept. 11, 2019), available at <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019>.

¹⁰ See, e.g., Jane Mutimear & Richard Vary, *International FRAND: The Last 18 Months and What Lies Ahead*, ICLG.com, <https://www.twobirds.com/en/our-lawyers/j/~media/ff3ab10c74ce4ef09e1e366231a956ac.ashx> (last visited Sept. 10, 2020); Timothy B. Lee, *How Qualcomm Shook Down the Cell Phone Industry for Almost 20 Years*, Ars Technica (May 30, 2019), available at <https://arstechnica.com/tech-policy/2019/05/how-qualcomm-shook-down-the-cell-phone-industry-for-almost-20-years/>.

Similarly, the law needs unambiguous and balanced boundaries around what are fair and reasonable licenses in this context. Guidance should also consider mechanisms for oversight. CSSPs cannot be forced to defend endless litigation over whether the terms of a potential license were unfair.

Response to 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?

Service providers, and especially smaller CSSPs, should be excused from making any effort to obtain authorisation for content that is less common on their service. As previously noted, instances of infringement are already exceedingly rare on most platforms.¹¹ Forcing platforms, especially startups, to spend their limited time, money, and human resources on obtaining authorisation for all types of content—regardless of what is regularly posted by their users—is wasteful and would give the largest platforms a structural advantage over smaller rivals.

Implementation of Article 17 should instead require platforms to entertain licensing requests from rightsholders only if the rightsholder can demonstrate that an unauthorised copy of specific copyright-protected material to be licensed has previously appeared on the platform. Structuring the licensing obligations in this way, when there has been demonstrated infringement, should be enough to qualify as “best efforts.”

Member States could also allow CSSPs to certify that their users rarely post certain types of content. This could be an explanation of technical limitations (e.g., if there are technical hurdles to posting video or music on a primarily text-based blogging platform). CSSPs could instead conduct a random sample of posts, to identify what types of content its users do and do not post (e.g., a platform where most users use the image sharing function might find relatively few posts containing audio or music). Alternatively, CSSPs could point to provisions in their terms of service that bar upload of certain file types or types of works. If some content—e.g., still images, video, or music—is difficult to upload or infrequently apparent on the platform, then the CSSP should be excused from seeking licenses to that type of content. Such certification should also be valid for a period of several years, so that platforms are not forced to continuously prove what types of content their users do and do not post.

Similar reasoning should apply to, e.g., background content. CSSPs should not be required to obtain licenses for background content. For a platform that primarily hosts podcasts, if several podcasters use short snips of background music for context or criticism, that background use of music should also be considered less common (such that the platform would not need to obtain licenses to songs).

¹¹ *Supra* response to question 1.

Response to 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.

Article 17 inherently favors larger organizations and certain traditional rightsholder organizations, and disadvantages smaller service providers and Internet-enabled creators. Guidance and Member State implementation should keep this disparity in mind, and seek to avoid making the current problems inherent in the Directive worse.

Many (if not most) of the larger CSSPs have already developed the technology they will need to comply with Article 17, negotiated with large rightsholder organizations to set up systems that address unauthorised uses of content, hired content moderators, and already possess the financial wherewithal to survive increased liability risks and costs associated with Article 17. Startups and smaller platforms are at a distinct and substantial disadvantage.

Moreover, startup CSSPs will be at an inherent disadvantage in trying to negotiate with large rightsholders. Large, established rightsholders and organizations have more bargaining power, and can use that power in ways that harm startups.¹²

Likewise, the past twenty years have ushered in an explosion of Internet-enabled creators who use myriad small or startup platforms to reach audiences across the globe, connect with fans, and generate income from their creative works in ways that were not possible before. But Article 17 could easily leave this important community out. It is not realistic to expect these small creators to negotiate with every platform for a license. It is also not realistic to expect every platform to seek out every small creator and negotiate. Moreover, because many of these creators rely on smaller platforms with novel business models to reach an audience and earn income, adopting legal frameworks that make it harder for those smaller platforms to survive and thrive primarily serves to the detriment of the creators who rely on them.

Overall, the EU has adopted a regime that could easily entrench larger, well-resourced, established organizations and make it harder for small platforms and creators to compete. Implementation efforts should seek to bring balance wherever possible.

Finally, CSSPs should be given a grace period for compliance with each Member States' implementation. Compliance will be complex and confusing at the start (before CSSPs know what specific actions will be considered "enough"). In addition, compliance with the law will require lengthy negotiations, hiring staff, and developing and deploying new technologies. All of that will be costly and it will also take time. CSSPs should be given a window of 12-18 months to come into compliance.

¹² See, e.g., *supra* response to question 4.

Response to 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.

Service providers should not have to continuously defend their efforts to comply with the laws implementing Article 17. Once a CSSP has established that it has made best efforts to avoid unauthorised content, it should be automatically allowed to use that as a defense against future accusations of infringement or a defense against liability. The “lifespan” for such a determination of best efforts should last for a certain (sufficient) amount of time, for example three years.

In addition, the requirement to ensure unavailability of unauthorised content should not be used as a backdoor to impose a general filtering mandate. Consistent with other provisions of the Directive and the current consultation document, it is obvious that Article 17 is not intended to create a filtering obligation. Implementation of Article 17(4)(b) cannot become a de facto filtering obligation, nor should it give rise to litigation over whether a platform’s filtering technology meets the “best efforts” threshold. Unambiguous legislation could confirm that use of technical tools to filter and remove posts is not required to comply with this provision.

Finally, for many (likely most) platforms, the notice and takedown system works well, as it is the best approach to removing unauthorised content on the numerous platforms where there are few instances of actual or even alleged infringement. As such, it will often be the case that a system for responding to takedown notices expeditiously will be sufficient and should be deemed adequate for showing “best efforts” here.

Response to 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?

A sufficiently substantiated notice should contain information which allows CSSPs to confirm the notice-sender is authorised to request the takedown, identify what the allegedly infringed content is (i.e., the protected work), and where the allegedly infringing uses are. It should also impose sufficient responsibility on the notice-sender to consider whether the complained-of post(s) is in fact authorised, by license, as a legitimate use, or otherwise. This should include at least the following:

- A signature that the notice-sender is authorized (either as the rightsholder him- or herself, or as the authorised agent of the rightsholder) to identify and request removal of unauthorised uses;
- Identification of any other rightsholders who have an interest in the work (e.g., co-authors, song writers, etc.);
- Identification of the copyrighted work(s) that is allegedly being infringed, and if there are multiple copyrighted components within the identified work, an indication of which (or if it is all) components of the work that are subject of the takedown notice;

- Identification of the posts that are claimed to be infringing, i.e., identification of the posts that are to be removed in response to the notice;
- A statement that the notice-sender has considered whether the complained-of posts are authorised, either by a license, as a legitimate use of content for criticism, etc., and concluded in good faith that the post is not in fact authorised; and
- A statement that the contents of the notice are accurate, under penalty of perjury.

Response to Question 11:

Are there any other elements related to the ‘notice and take down’ and ‘notice and stay-down’ 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.

Article 17(4)(c) tees up an impossible constellation of requirements, because it requires review of every post to determine whether it matches content identified for staydown. It is impossible to enforce staydown without technology to identify copyrighted material.¹³ Member States should consider ways to reduce the costs and risk of this de facto filtering mandate, in the interest of proportionality and to align with Article 17(8)’s avoidance of an affirmative monitoring requirement.

While mandatory filtering significantly increases the costs of market entry, it is critical to appreciate that filtering tools are also inadequate and/or non-existent. When such technology fails (and it does), CSSPs would face massive liability for failure to satisfy staydown. This risk of massive liability is especially troublesome for startups, because they lack money to cover damages and investors will be reluctant to finance early stage platforms if there’s a chance their money would be used to cover liability.¹⁴

Rather than subject CSSPs to endless litigation over whether they have implemented a reasonable staydown approach, Member States should consider spelling out exact criteria on how to comply. Because the technology needed to implement notice-and-staydown accurately and thoroughly does not exist, Member States could endorse a more achievable technology. For example, Member States could endorse hash filtering. If CSSPs deployed tailored hash filtering, then they would not be liable for staydown failures. Commonly-used hash functions provide a method to compare and match identical files without consuming substantial processing power. If the same file is uploaded twice, the second upload can be promptly flagged for removal.¹⁵

However, context matters in copyright enforcement, and a second file upload may not be infringing. It could be licensed or a legitimate criticism. As such, endorsing hash filtering would need to be tailored to

¹³ Chris Sprigman & Mark Lemley, Opinion, *Why Notice-and-Takedown is a Bit of Copyright Law Worth Saving*, L.A. Times (June 21, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html>.

¹⁴ See, e.g., *supra* note 3; Colin Sullivan, *Creators and Tech Companies Can Be Friends*, Medium (Jan. 19, 2017), <https://patreonhq.com/creators-and-tech-companies-can-be-friends-c18a8508c60d> (“If a law like takedown and staydown existed three years ago, [Patreon] never would have received the funding to start as a company because of the massive liabilities associated with user generated content . . .”).

¹⁵ See, e.g., Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* 11-12 (Mar. 2017), available at <https://www.engine.is/the-limits-of-filtering> (describing hash filtering).

limit the takedown of authorised posts. The hash filtering obligation could be tied to the type of content or purpose of the platform. And were this approach adopted, rightsholders should be required to submit reference ids to a central database CSSPs could access at no (or very low) cost.

While an imperfect solution, imposing some sort of tailored and limited hash filtering mandate may be the only way to achieve staydown without imposing untenable liability and evolving filtering technology and staffing obligations on startup CSSPs.

Response to 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?

Guidance and Member State implementation of Article 17(6) should include language that makes this provision workable. Younger companies should not be forced to constantly monitor user volume and finances to determine whether they meet the Directive’s definition of a “new” service. And all CSSPs should be afforded a grace period to come into compliance with the law after they phase out of the “new” company liability regime.

CSSPs should be allowed to collect and monitor user volume and financial data as they would in the ordinary course of business. Member States should not impose additional data collection and monitoring obligations merely for the purpose of measuring size and annual turnover in the context of Article 17(6). Then, in the ordinary course of business, as CSSPs learn that they do or no longer meet the definition of “new,” that can trigger the new liability regime and accompanying obligations.

In addition, companies should be given a window of time (e.g., 12-18 months) to come into compliance with the full obligations of Article 17. As noted, developing the technology, negotiating the licenses, and hiring the staff to meet all of Article 17’s requirements will be time consuming and expensive (especially for smaller or younger companies).¹⁶ If CSSPs are not given a grace period to comply, then they will have to start expending the substantial effort of compliance well before they reach the three-year threshold. That would, in turn, further inhibit establishment, growth, and success of young companies.

Many of our responses to the other questions are relevant to “new” services, as Article 17’s definition of “new” services encompasses a subset of startup platforms and small CSSPs. The need for clarity, balance, fairness, proportionality, and avoidance of undue burden all apply with equal force to “new” services, as well as companies that no longer meet the Directive’s definition of “new.”

¹⁶ See, e.g., *supra* response to question 6.

Response to 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?

It is essential to protect legitimate uses of content, and to the extent Article 17 can expand safeguards for such uses, it would be a significant improvement.

That said, the tools CSSPs need to police and protect legitimate uses will be out of reach for many startups. Technology, both imperfect and expensive, also cannot make context-specific determinations about what is quotation, criticism, caricature, parody, etc. Human review would also be very expensive, requiring well-trained legal employees to identify legitimate uses.

Moreover, assessment of legitimate use will also implicate facts outside a CSSP's possession. For example, a copyrighted work can include both public domain foundations and creative elements. Literary tropes and standard writing plot points are generally considered public domain. If two authors both use common tropes and standard plot points, each is making a legitimate use.¹⁷ But resolving a dispute between those two authors over whether one is infringing is a complicated inquiry that CSSP employees might not be able to make.

In implementing Article 17, Member States should not make CSSPs responsible for decisions about legitimate use, and find mechanisms to bring others (including outside experts, the users, and rightsholders) into that assessment. Indeed, in any dispute over legitimate use there is no sound reason to force a private third-party to adjudicate important issues of free expression and legitimate use on the one hand and actual infringement on the other. These are precisely the types of issues the judicial system is equipped and intended to resolve. Forcing companies into the position of being a venue for alternative dispute resolution (ADR) would create a fundamental change in the way these CSSPs do business—they develop innovative technologies, explore new business models, offer services to users and creators, etc.—and they hire employees like engineers and web developers. They are not businesses set up to conduct ADR—those industries exist, and providers employ lawyers and case managers. Member States should not force CSSPs to build out ADR units in order to exist.

Relatedly, there are practical arguments against forcing CSSPs into the ADR business. Unlike a stand-alone ADR provider, CSSPs have a stake in the disputes between rightsholders and users. If the CSSP makes the “wrong call” about whether to restore or remove disputed content, then it faces liability for infringing posts that are left online.

¹⁷ For a relevant example, see Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, New York Times (May 29, 2020), <https://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html>.

Response to 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)?

Dispute settlement and complaint and redress approaches should be balanced and incorporate core features of due process. There must be unbiased decisionmakers. Parties—especially individual users and smaller platforms—must have full access to the evidence they would need to prove their case, basic resources (sometimes including legal representation), and should have the right to appeal adverse decisions.

The system should also include protections against abuse. For example, there should be appropriate limitations on damages, such that minor, accidental, or unknowing instances of infringement are not subject to steep damages awards or onerous injunctive relief (such as lengthy takedowns or loss of access to a platform or service). Those sorts of high damages for infringement create a fertile foundation for abuse. Instead, damages for infringement should be tied to actual harm the rightsholder suffered, and the amount of damages should reflect the full circumstance (again, so that minor or accidental infringement does not cost too much). Likewise, where there is a strong case to be made that the alleged infringement was authorised or legitimate, that fact should also mitigate damages.

In addition, damages should be equitable, so that rightsholders are not able to seek a lot of money from accused infringers while wrongfully accused infringers are unable to seek similar damages. Users and service providers wrongfully targeted with infringement accusations should be able to seek sufficient damages, and the damages available against rightsholders who send improper notices should be calibrated to deter abuse of the system.

Response to 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.

Guidance should afford enough flexibility and security around a CSSP's operations to prevent abuse of the system. In the U.S., purported rightsholders with knowledge of a platform's policies around takedowns and repeat infringers can craft targeted takedown requests to harass, harm competition, remove legitimate speech, or unmask anonymous critics. Flexibility within the system allows CSSPs to tailor responses in some cases to avoid such abusive or problematic outcomes. Likewise, allowing CSSPs to maintain some details of their policies and tools as private will make it harder for would-be abusers to develop a roadmap. This will help CSSPs to continue to accommodate competition, creativity, anonymous criticism, and legitimate speech.