



Brussels, 10.09.2020

## GESAC's answers to the Consultation on the implementation of the Article 17 of the Copyright in the Digital Single Market Directive

### 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.**

As mentioned in the Consultation document of the European Commission (the "EC"), some of the elements provided in Rec 62-63 serve to explain the economic and legal rationale for Art 17 while others are intended to help interpret the provision. The former are not meant to be included in any definition and therefore should not. Such is the case notably as regards competition for the same audience referred to in Rec 62. Moreover, as regards this competition issue, GESAC is aware that some major online content sharing services providers ("OCSSPs") like YouTube argue, with a view of limiting their liability, for a strict competition law interpretation. Such is not the purpose of the reference and the Directive is a copyright/authors' rights legislation. The underlying idea is that **(i) in order to develop, the online market needs fairness and (ii) such fairness requires that OCSSPs that offer all sorts of content which attract consumers in the same way as other services do, and that capture a large part of the latter's' advertising revenue, should be subject to the same authorisation regime** (the only difference lies in the existence of mitigation measures), all the more so as overall revenues of creators are greatly impacted as a consequence.<sup>1</sup>

In its proposed Guidelines, the EC suggests giving examples of services which do not meet the definition laid down by Art 2.6. It therefore seems important to GESAC that it adds to such list **"service providers the main purpose of which is to engage in or facilitate copyright piracy"**, mentioned in Rec 62. There should be no doubt possible as to the fact that they **cannot benefit from the mitigation measures created by the new Copyright Directive** ("Directive").

Lastly, it is essential, given the discussions that took place during the elaboration of the Directive, that it be clarified that the organisation and promotion activities regarding protected content referred to in Rec 62 and Art 2.6 can be carried out by automated means. **The use of automated**

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<sup>1</sup> See in this respect "Cultural Content in the Online Environment: Analyzing the Value Transfer in Europe", Roland Berger, 2015, for a comprehensive market analysis on how different services that claim intermediary status benefit from access to cultural and creative content and their comparison with some of the legitimate online businesses, retrievable from <https://authorsocieties.eu/content/uploads/2016/02/report-for-gesac-online-intermediaries-2015-nov-eur.pdf>. See also in respect of affecting revenues from other exploitations a comprehensive economic analysis of S. Liebowitz, "Economic Analysis of Safe Harbor Provisions", 2018, retrievable from <https://www.cisac.org/Media/Studies-and-Reports/Publications/Transfer-of-Value-Study/Dr.-Stan-Liebowitz-Economic-Analysis-of-Safe-Harbor-Provisions>

tools should not disqualify any online service provider from being considered an OCSSP within the meaning of the Directive or the Directive will be useless and not serve its purpose.

## 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.**

a) GESAC understands why Art 17 can be considered as a “lex specialis” in that it lays down an irrebuttable presumption that a service provider that “gives the public access to copyright protected works or other protected subject matter uploaded by its users” performs an act of “communication to the public” (“C2P”) within the meaning of Art. 3 of the InfoSoc Directive. **Once the service falls under the definition there is neither the need to prove the existence of the act of C2P nor the possibility to hide behind Rec 27 of the InfoSoc Directive.**

**It should however be clear that Art 17 does not create a “sui generis right”,** in particular as regards authorisations. Art 3 of the InfoSoc Directive is clearly and expressly referred to in Rec 64, Art 17.1 and 17.2, and Rec 4 further states that “*This Directive is based upon, and complements, the rules laid down in the directives currently in force in this area*”, in particular, among others, the InfoSoc Directive.

The C2P act of Art 17 is a C2P act within the scope of Art 3 of the InfoSoc Directive.

It is therefore natural to expect that MS transpose Art 17 of the Directive and its reference to C2P in line with the InfoSoc Directive and that C2P and the related authorisations are to be understood as within such directive. MS should therefore be able to rely, contrary to what the Consultation document seems to infer, on their implementation in particular of the InfoSoc Directive. Any other solution would go against the harmonisation towards which the Directive aims and would add to it in a way that the legislator did not consider.

Having said that, GESAC is of the opinion that collective licencing provides the best balance for widest possible access for consumers and appropriate remuneration of authors. GESAC also believes that extended collective licensing solutions can be developed in this respect, where the conditions of Art 12 of the Directive are met.

It also considers that mediation mechanisms can be an option, all the more so as CMOs are subject to alternative dispute resolution procedures for their disputes with online service providers as regards licensing, under Art 34 and 35 of the CRM Directive.

It is also natural that MS should mention in their transposition that, as a consequence, OCSSPs are not hosting service providers within the meaning of Art 14 of the E-commerce Directive which doesn't apply with regards to usages under Art 17. The Guidelines should be explicit in this as well, as application of Art 14 of the E-commerce Directive to online content sharing service providers was the key element that led to the adoption of the Directive.

b) GESAC agrees with the EC's suggestion in the Consultation document that quantitative thresholds are not a good idea for assessing ‘significant revenues’ to determine the scope of the “pass-through licences” provided under Art 17.2. As an overall assessment, for instance, participation in

monetisation schemes of the platforms for influencers and channel operators can be considered as indicators for commercial basis.

c) GESAC believes that it is important that the Guidelines mention that the authorisations to be sought by OCSSPs should include the reproduction acts carried out by the latter (as they store content and by definition are actively involved both in storing and giving access to protected content) which also require authorisation. The Directive focused on C2P, as application of Art 14 of the E-commerce Directive was being put forward to avoid liability under Art 3 of the InfoSoc Directive, but this in no way means that an authorization for C2P is sufficient under copyright law for the operation of OCSSPs.

***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?***

(continuation of answer to Q3)

GESAC would like to raise its concern on the paragraphs of the Consultation document relating to Rec 69 and Art 17.2 which are misleading in several aspects.

First, when giving an example of users which would be outside the scope or would not be covered by the authorization granted to the OCSSP, the Consultation document refers to users acting on a commercial basis **and** deriving significant revenues from their uploads. This gives the impression that the commercial basis and significant revenues criteria are cumulative. They are however alternative in the Directive. It would therefore seem preferable, in order not to create confusion, to give 3 examples: users acting on a commercial basis, e.g. commercial operators, users<sup>2</sup> deriving significant revenues from their uploads and users being in both situations.

Also, it should be recalled that the aim of Art 17 is to clarify that OCSSPs communicate to the public. There was never any dispute as to the fact that uploaders do also. One of the purposes of Art 17.2 is to give individual non-commercial uploaders and uploaders which don't generate significant revenues with their uploads legal certainty by shifting the entire liability for C2P on the OCSSPs by covering the formers' copyright relevant acts by OCSSP's authorisations.

Rec 69 provides that where uploaders are **expressly** granted an authorisation by right holders for their uploads and making available on OCSSPs, such authorisation covers the OCSSPs' act of C2P. As OCSSPs carry out an act of C2P, the aforementioned mechanism should not be a means for them to offload their legal obligation onto users of their services, in particular by means of acceptance of their general terms and conditions. There is no room for presumptions here. Therefore, the Guidelines should be clear in this respect and stress that only an express authorisation granted by the right holders to uploaders can cover the OCSSPs' acts of C2P.

### **III. SPECIFIC LIABILITY REGIME UNDER ARTICLE 17**

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<sup>2</sup> This would apply also when the uploader can be qualified as a "consumer" under other EU laws as long as it generates significant revenue from his/her upload

## 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.***

2600 character(s) maximum

As the Consultation document rightly states, guidance should make clear that the best effort for the obligation to obtain an authorisation implies engaging proactively with CMOs with the intention of rapidly getting an authorisation. This should imply that content-sharing service providers must be able to clearly demonstrate that they have “taken all steps” to procure a licence.

First and as a reminder, the list of EU CMOs is published both on the website of the EC and in the records and/or websites of national supervisory authorities. They are therefore easy to find and to locate.

Also, it is important to note that the negotiation framework with CMOs is both economically and legally stable. Under the CRM Directive, the CMOs must publish their standard licensing contracts and standard applicable tariffs. In this respect, Art 16 of the CRM Directive also usefully requires that the parties should conduct negotiations in “good faith” and contains detailed provisions on tariff setting of CMOs, mentioning that the terms and conditions of licences shall be reasonable

Especially in the music sector, negotiations require little effort and entail limited transaction costs as the contractual practices are well established and have been in place for a long time.

This is why the Guidelines should be clear as to the fact that refusing to pay the established tariffs of CMOs or conclude the standard terms and conditions which are part of a long and well established contractual practice are to be considered as falling short of the best efforts to be made and should trigger full liability.

Then, to avoid any delaying tactics during the negotiation process, the Guidelines should provide that authorisations are to cover the permission and relevant terms and conditions, including royalties for the use of works during such process.

Finally, it is important to insist on the fact that OCSSPs should not limit themselves to contacting CMOs, or more generally right holders, to be considered as having carried out their best efforts. In order to offer the most appropriate licence, both in the interest of the OCSSPs and of the right holders, the right holders need precise, specific and updated information relating to the works being used – which can in no way be considered as general monitoring (GESAC doesn’t understand the reference to Art 17(8) in this part of the Consultation document: how can right holders offer the appropriate licence if they don’t have information on the works used? This is also essential for accurate distribution of accrued royalties) - and the receipts generated by such use as well as the OCSSPs’ business model, rules on monetization and categorization of content which have a direct impact on the right holders’ remuneration. The best efforts to be made within the licensing obligation should entail the OCSSPs providing the right holders with all necessary information to offer and finalise the licence. Failing which, right holders will not be ensured of receiving the fair remuneration to which they are entitled and which the Directive aims for, in particular in its Art. 18 and 19.

***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?***

Art 17.1 clearly requires any OCSSP to obtain a licence to make protected works available on its platform. Obviously, the objective impossibility of finding all relevant rightholders to trigger mitigation can be assessed differently depending on the type of content, since finding all copyright holders that are not represented by CMOs can be more challenging in certain sectors than in others. However, CMOs in any field are one of the natural destinations to seek licences and to find information, and this should be mentioned in the Guidelines.

The developments in the previous answer provide an answer to this question as well.

CMOs are easy to identify for all types of OCSSPs, big or small, they publish their standard terms and conditions, which facilitate the licensing process and in turn limit transaction costs. In the music sector there are long- and well-established contractual practices. In other sectors, CMOs also already publish blanket licences at national level or develop new solutions for multi-territorial effect.

It should be observed in this respect that CMOs' licences are adapted to the size, usage and revenues of the licensees which, for the smaller ones, can benefit from one click licences ("micro-licensing").

There is no need to make a difference in the assessment of the best effort obligation to obtain an authorisation between large and smaller OCSSPs where CMOs are concerned.

***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.***

GESAC would like to stress again that OCSSPs have to get an authorisation for the act of C2P of protected works they carry out. The Guidelines should underline that not obtaining an available licence from CMOs, while giving access to protected content, constitutes an infringement and refusal of the services to license entails full liability under Art 3 of the InfoSoc Directive in conformity with the appropriate implementation rules of the Enforcement Directive (2004/48/EU) and national laws.

Transparency is also of utmost importance to implement fair licensing agreements that ensure appropriate remuneration for right holders. Precise, specific and updated information relating to the works being used and the receipts generated by such use as well as the OCSSPs' business model, rules on monetisation and categorisation of content which have a direct impact on right holders' remuneration are key for a successful implementation of Art 17 and the Guidelines should be clear in this respect.

## **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.*

**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)?**

**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.**

### **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?**

**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.**

GESAC would like to answer questions 7 to 11 of Sections II and III together. In case of collective management, licensing is always the preferred option and we addressed the liability issues of OCSSPs regarding licensing broadly in our answers to the previous questions. Therefore, GESAC intends to limit its comments in this part to certain points of principle.

Firstly, GESAC notes that Art 17.1 of the Directive clarifies that OCSSPs undertake copyright relevant acts and Art 17.3 and Recital 65 provide that *“When online content-sharing service providers are liable for acts of communication to the public or making available to the public under the conditions laid down in this Directive, Article 14(1) of Directive 2000/31/EC should not apply to the liability arising from the provision of this Directive on the use of protected content by online content-sharing service providers.”* Any reference of the Guidelines to the so-called “mitigation measures” provided in Art 17.4 needs to be assessed within this framework and as a limited exception to these principles without going further than what is provided in the Directive.

Art 17.4(b) and (c) can only function appropriately if the right holders and the OCSSPs cooperate properly and effectively – and in this respect the Guidelines should insist on such obligation and not present it as a mere possibility (*“The service providers together with rightholders may cooperate on the best way”* should be replaced by *“The service providers together with rightholders **should** cooperate on the best way”*). Liability mitigation kicks in only after a best effort taking into account best industry practices and all relevant factors and developments available in the market. As a consequence:

- **OCSSPs should use all relevant data in the market to carry out their best effort to implement the Directive and, especially the bigger and more established ones, need to develop and deploy measures to perform their duties with new and evolving technologies.** Therefore, the reference in the Consultation document stating that *“if no such information is provided by rightholders, service providers are not liable for unauthorised uploads of unidentified content”* on page 9 is too simplistic and does not fully reflect the carefully drafted provision of Rec 66 and Art 17.4(b). Indeed, relevant and necessary information is crucial for the proper implementation, but Rec 66 carefully notes that the OCSSPs should in any case act *“in accordance with high industry standards of professional diligence”* in reaching the desired result, by making sure that it is also the duty of the OCSSP to gather the necessary information, where they can, as part of high industry standards of professional diligence and to develop the appropriate tools.
- **Relevant and necessary information relates only to the rights and protected works (or other subject matter) that a rightholder represents/owns and should not include as a requirement information on other rightholders’ rights or management information.** For instance, in case of musical works, relevant and necessary information would be the title of the work, the name(s) of the author(s) and any additional available metadata but authors’ societies cannot be expected to provide the data on the usage of that musical work in a specific sound-recording, or the sound-recording itself, which are data owned by the rightholders of sound-recordings.

**The Consultation document of the EC on page 11 seems to create new and further obligations for rightholders as regards the format of the information to be provided to OCSSPs for the exercise of Art 17.4(b) and (c).** It is certainly not the OCSSP who determines what format to accept and what others to refuse in a certain situation and it is more the best effort of the OCSSP to act on the relevant and necessary information for each type of rightholder. (It can also be noted that the “Commission Recommendation on Measures to Effectively Tackle Illegal Content Online” is designed for services who can benefit from one of the Article 14 of the E-Commerce Directive and what is expected from OCSSPs and what is to be provided to them can therefore be interpreted in a different manner than what is currently done by the Consultation document of the EC on page 11.)

**It also mistakenly states that the application of Art 17.4(c) requires that the right holders provide OCSSPs with same type of relevant and necessary information which is relevant for the application of (b).** However, under (c), providing information as to where the work or content can be found in the service is sufficient as the OCSSP can, with such information, create its own fingerprint. Such cannot obviously be the case under (b) as it concerns an ex ante measure.

- OCSSPs shall be required to develop and deploy technologies that properly identify the different usages of musical works, including through melody recognition, for instance, when the work is used in other ways than in a specific protected sound-recording. This is particularly important for licensing purposes and can be a useful element in ensuring the unavailability in case there is no licensing agreement.

- The Guidelines can more clearly say that non-compliance with this provision means a copyright infringement and full liability of the OCSSP, including paying damages under relevant national laws.
- As regards the prohibition of any general monitoring obligation, it is also key to recall that general monitoring can only be understood as searching for potentially illegal content and implies permanent, systematic monitoring of all the hosted content with no prior identification of what to search for. It does not therefore apply when the content to be searched for is identified. Such explanation could usefully be provided in the Guidelines.

#### **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?***

**As Art 17.6 makes clear, the licensing obligation provided in Art 17.1 applies to all services, whether large or small, new or well-established and the application of the special regime it provides does not exempt those “new” OCSSPs from such obligation as the Guidelines should recall – it only does so expressly for the obligations under 17.4(b) and, as the case may be, 17.4 (c).**

**CMOs in any field are one of the natural destinations to seek licences and to find information, and this can be usefully mentioned in the Guidelines.** The collective licences are typically adapted to the volume of usage, revenues of the service and the business model. Moreover, CMOs are required to treat similar users in similar way and can also develop new and experimental licences for start-ups that come up with new models of access and therefore can easily fit to the needs of services referred to in Art 17.6 without any difficulty.

It is also to be mentioned, where appropriate and necessary, CMOs can also be mandated to provide “extended collective licences” for the ease of rights clearance under the conditions set by national laws pursuant to Art 12 of the Copyright 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?***

***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)?***

**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.**

GESAC would like to answer questions 13 to 15 of Section IV together.

**As an initial observation, we would like to note that Art 17 is, first and foremost, designed to encourage and incentivise licensing to achieve the objective of availability of the widest possible content while appropriately remunerating creators.** Therefore, GESAC always defended that the best solution to avoid any problems as regards legitimate uses and to provide widest possible access is licensing and ideally collective licensing.

**Since the need for safeguards for legitimate usages under Art 17 emerges only in case of (ex ante) blocking measures, any proposal that the Guidelines considers in this respect shall neither negatively affect licensing nor disincentivise it in any way.** Any such negative impact would totally be in contradiction with the purpose of Art 17. The Consultation document notes this crucial point on page 15 and the Guidelines must be very clear in expressing that any reference to “likely infringing” or “likely legitimate” **shall not create a legal presumption on the legal status of the content and such assisting proposals, were they to be adopted, can only be relevant for the functioning of automated ex-ante blocking measures and not for the identification of the content for licensing purposes.**

i) As regards Art 17.7 that makes certain specific optional exceptions in Art 5 of the InfoSoc Directive mandatory for the purposes of this provision, **GESAC recognises that this provision and its related Rec 70 provide a fair balance, provided that the Guidelines document does not attempt to (re)interpret the scope of the referred exceptions under EU law (which it has no power to do) or try to include new exceptions to the list that the legislator refused to include, such as the “incidental use” exception as pushed by the major OCSSPs trying to limit their liability and as, unfortunately, also mentioned in the Consultation document.** Inclusion of “incidental use” or any other new exception that is not mentioned in Art 17.7 in the Guidelines document as a recommendation to MS would go against the intention of the legislator and would go beyond the merit of the Commission’s work. It would also conflict with the subsidiarity principle that applies to the implementation of exceptions under the InfoSoc Directive.

On the other hand, in order to strike a fair balance to ensure widest possible access for citizens and not to unjustifiably prejudice the rights of authors, the Commission can usefully state that the MS that have not had these exceptions in their national law before shall be able to introduce an accompanying compensation scheme, when including them in their national law. Especially, considering the fact that the OCSSPs are direct commercial beneficiaries of users’ acts relying on those exceptions, a too broad and an uncompensated new exception can be incompatible with the “three-step test” of the EU and international law.

ii) **GESAC observes that the Directive nowhere mentions “likely legitimate” and “likely infringing” uploads. These concepts were therefore devised by the EC for the purpose of the Guidelines.**

Such distinction is unacceptable.

First, there is much uncertainty attached to such concepts which are not legal concepts and which are moreover novel. No indication is given as to what characterises one or the other. There is merely mention, in a vague manner, of “a number of technical characteristics of the upload as appropriate” and examples are given: the level of match with the reference file provided by the rights holder and the length/size of the content used in the upload.

GESAC draws attention to the fact that duration of exploitation of a protected work is not sufficient to assess whether such exploitation falls within the scope of an exception, since both works and **parts of works** are protected according to the EU law, Berne Convention and WIPO Treaties. The purpose of the use in question needs also to be considered in order to verify whether it corresponds to the purpose covered by the legal exception. Thus, the CJEU in its Pelham/Hutter decision, recalled that the use of a recognisable few seconds of a protected phonogram, which was incorporated into another phonogram using the sampling technique, constituted an illicit use as, in this case, it did not fall under the quotation exception because the incorporation was made for recreational purposes, without meeting the other preconditions of the quotation.

In respect of the level of match, GESAC can only note that Art 17, and especially Art 17.4, does not limit the best efforts to ensuring unavailability of illegal content simply to content that is in whole or in part identical to the content for which right holders have provided information. Identity of content is also not an applicable concept in copyright/authors’ rights matters insofar as there may be various interpretations by various artists of a particular work, irrespective of whether it is exploited in its entirety.

Also worrying, especially in view of the vagueness of the concepts underlined above, is the fact that such distinction would be assessed by the OCSSPs whereas the precise scope of an exception should be determined by courts, the only qualified authority for such matters.

Then, there are the consequences that are attached to such distinction. The Consultation document envisages that “likely legitimate” content should be kept available and be subject only to ex post measures. Such availability where right holders have requested an ex ante blocking measure goes contrary to the Directive (the ex-ante system becomes de facto an ex post system) and contrary to the pre-emptive nature of the right holders’ exclusive rights. In fact, such mechanism results in making the exception the general principle and the application of exclusive rights would become the exception.

GESAC therefore has strong reservations on such consequences and favours a system where each of the steps would require confirmation by the parties concerned.

Rightholders who have communicated the relevant and necessary information about their content in order to ensure ex-ante blocking by the platform could thus be asked to confirm their intention to maintain the content-blocking in question if this is challenged on the grounds of legitimate use by the user who uploaded the disputed content.

Should rightholders decide to maintain this blocking, they could, if appropriate, be held liable at the end of the appeal procedure provided for in Art 17.9 if the use in question proves to be legitimate on the grounds (a) that the content is not or is no longer protected, (b) that appropriate authorisation has been granted for the content or (c) that it falls within the scope of an exception to copyright and related rights.

In the interest of reciprocity, provision should also be made for a system of liability vis-à-vis users who make unjustified or abusive use of the aforementioned complaint and redress procedure provided for in Art 17.9.

Online content-sharing platforms will be held liable if they do not make their best efforts, in the light of the proportionality principle, to ensure the unavailability of unauthorised content for which rightholders have provided them with the necessary and relevant information to enable such blocking operations. Once such relevant and necessary information has been submitted to them by rightholders, a lack of responsiveness on the part of the platforms will thus give rise to liability on the part of the platforms under Art 17.4 b) of the Directive. If ex-ante blocking of content has been upheld by a confirmation from a rightholder, even if such blocking has been found by the complaints procedure to be unjustified because it fell within the scope of legitimate use, liability for such blocking should be transferred to the rightholder concerned who has knowingly maintained an unfounded request for content-blocking.

iii) The Consultation document puts forward the **principle of the country of origin** to be applied to the complaint and redress mechanism. **This is in no way acceptable to GESAC notwithstanding the fact that it would be adding, in an unduly manner, to the Directive and that it goes contrary to every copyright rule.** Art 17 is a copyright rule as recalled in answer to question 2. Under copyright rules, the principle of the country of destination (exploitation) applies to better protect the interests of the rights holders. The complaint and redress mechanism is part of a copyright mechanism. There is therefore no reason to exempt it from the general copyright principles, all the more so as there can be no doubt that OCSSPs will take advantage of the principle of the country of origin to establish themselves in the most lenient countries.

iv) GESAC calls for caution in referring to “whitelisting” of any certain copyright/authors’ right protected content for implementation of Art 17. Such practice is more relevant for media law related aspects of broadcasters’ programmes that they upload on OCSSPs. Such reference, were it to be made, should be strictly limited to (ex-ante) blocking measures, apply to the extent that, for instance, such broadcaster has its own licence for including those works in its programme and should not have any impact on the licensing obligation of the OCSSP for making available of underlying works under the latter’s licensing obligation.

v) Lastly GESAC cannot but wonder why the Consultation document suggests that the OCSSPs should be encouraged to put in place standard forms for uploaders to contest the blocking or removal of their content. This seems like a measure, not mentioned in any way or form by the Directive, to encourage such contestations where there is no reason to presume that uploaders need to be encouraged. It is tantamount to laying down a presumption that rightholders’ acts need to be challenged as much as possible. In any case, the forms to be provided by OCSSPs should also include information about the liability which the user is incurring in case of erroneous or abusive contestations, stress the importance of copyright/authors’ rights, and explain the consequences of illegal activity on the platform.

## **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.***

GESAC is very concerned about the way in which the Consultation document deals with this crucial point for creators. The EC seems to suggest that OCSSPs do not have to provide detailed and individualised information in case of licensing. However, the Directive provides for the exact opposite. This may be only a drafting problem, and we recognise there is a reference to Art 17 of the CRM Directive, but considering several presentations made specifically on this issue during the Stakeholders Dialogue, the creators' community would certainly expect a more careful reflection of Art 17.8 and the Recital 68 by the EC in the Guidelines.

GESAC has repeatedly stated that this provision is as important as the provisions establishing the copyright liability of OCSSPs. In the online licensing environment, rightholders can only invoice what is identified as a usage by the service. Therefore, accurate and transparent reporting from the services is the basis of the amount of the remuneration that creators receive. This means that, even where you have a deal, every usage that is not reported or that is excluded from the appropriate content recognition and management tools is exploitation without remuneration for creators, hence, in fact, infringement of copyright and contractual obligations of OCSSPs. Prior to Art 17, OCSSPs were in most cases refusing licensing agreements, or some like YouTube were imposing certain types of monetisation arrangements (by denying their copyright liability) at very low value and with total opacity. The same way they refused copyright liability, they also refused accurate and transparent reporting on the exact usage that takes place on their platform and the different ways they monetise or financially benefit from the content. Art 17 and, in particular Art 17.8, is adopted as a law to end this unfairness and arbitrariness. Giving as an interpretation that the OCSSPs are not required to provide detailed information under licensing agreements would therefore be against the very purpose of Art 17 and unjustifiably reward OCSSPs with a new type of "non-liability" in contractual relations that is not part of any EU law. As such this transparency obligation should be clear and complement Art 17 of the CRM Directive, and not become an exception to it or weaken it.

Art 17.8 sets an obligation for OCSSPs to provide rightholders "*with adequate information on the functioning of their practices, ...and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.*"

Rec 68 underlines that "*OSCCPs should be transparent with rightholders with regard to the steps taken in the context of cooperation*". It also notes that OSCCPs shall provide enough transparency, at the request of rightholders, with adequate and sufficiently specific information on the type of actions undertaken and the way in which they are undertaken within the cooperation obligations of the OCSSPs. Contrary to what the Consultation document suggests, it is important to underline that, in order to note the possible differences in the detail and granularity of such information regarding different actions to be taken as part of the cooperation under Art 17.4 (i.e. licensing, prevention and notice and stay-down), Rec 68 clarifies that where agreements are concluded by the parties for the use of protected works, the obligation to provide information can (and actually should) be more specific under the contractual arrangements in order to fulfil this transparency requirement.

We would like to reiterate that use of automated content recognition technologies in music or other relevant tools for other content<sup>3</sup> is absolutely crucial for licensing purposes and these technologies are essential to accurately identify which works are used and how much revenue needs to be distributed to which creator. This provision gives the legal basis for clearly improving the revenues accrued on creators by receiving all exploitation data in a timely manner and agreed format and creators' community expects that the Commission properly and strongly reflects this point in its forthcoming Guidelines.

***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.***

GESAC suggests that the Guidelines also give indications on what type of information to be provided by OCSSPs as a standard, which can be detailed and further elaborated by licensing agreements and based on the type of work or exploitation.

In particular, the following elements shall be considered as the basic information to be provided by the OCSSPs for the use of protected works in their relations with authors' societies and these can be usefully added in the text of the Guidelines:

- Necessity to agree with CMOs on the functioning of technical tools that will be used for identification and reporting of licensed content
- Use of all appropriate tools for identification and reporting of usage of works (for instance not only "sound recording" data that does not capture all different usages of musical works)
- Provision of transparency on monetisation and other revenues generated by OCSSPs directly or indirectly linked to the access to protected content to fully understand the exploitation by the service and to accurately calculate the corresponding royalty payment
- Accuracy of usage reports within agreed time frame and agreed formats. In this respect, OCSSPs shall use effective tools fit for the purposes of copyright law (and no longer only based on their own commercial choices) to ensure effectiveness of rights management and to avoid inefficiencies and duplication of efforts. In line with Article 17 of CRM Directive, if reporting is not in a format agreed by the CMOs or not in line with the industry standards used by the CMO, such obligation would not be fulfilled
- Possibility of verifying OCSSPs' reports through technical ways
- Possibility of auditing OCSSPs

## **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.***

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<sup>3</sup> It is to be noted that automated content recognition is required to be used either alone or in conjunction with other technical and operational solutions in the visual arts field, such as meta data and semi-automated search, due to the current state of the market.

As a concluding remark, GESAC would like to add that it is important that the guidance remains a guidance and not be used to change the Directive which the legislator adopted and modify the delicate balance that was struck between the different interests at stake. The guidance should not be *contra legem*. Some of the statements in this Consultation document and some of the questions, e.g. as regards the relation with Art 3 of the InfoSoc Directive, the new concepts such as “likely infringing” and “likely legitimate” or the application of the principle of the country of origin, seem to add to the Directive in a way which was not envisaged by the legislator.

GESAC is also concerned that some of the options, e.g. as regards the “pass through” licences, the creation of an “incidental use” exception or the form to enable to report legitimate uses, seem to shift the balance achieved by the Directive to the benefit of the OCSSPs or the users and to the detriment of the right holders. This is unacceptable and would jeopardise the purpose of the Directive.