



**Iceland Questionnaire for interested parties regarding Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (the Directive)**

**May 2022**

Google appreciates the opportunity to submit comments to the Icelandic government's questionnaire looking at key questions related to the implementation of the EU Copyright Directive (2019). We have primarily focused on answering the questions related to text and data mining, extended collective licensing, the press publishers right, and the use of protected content by online content-sharing service providers.

***Article 3 and Article 4: Exception or limitation for text and data mining.***

*Article 3*

The provision concerns exemptions for text and data mining that can be granted to research and cultural heritage institutions in connection with scientific research of lawfully accessible works. This exemption cannot be negotiated away. Rightholders shall be allowed to apply measures to ensure the security and integrity of the websites and databases where the works or other subject matter<sup>1</sup> are hosted. There is no requirement of remuneration for use on the basis of the exception set out in Article 3.

Most limitations and exceptions<sup>2</sup> in the Copyright Act also apply to photographs which are protected according to Article 49 of the Copyright Act. However, such photographs are not protected by EU law, and therefore Articles 3 and 4 of the Directive do not apply to them.

*Article 4*

The provision includes a general exemption for text and data mining that is not confined to research or educational institutions, based on the rightholder not having prohibited such use.

**Questions:**

- 1. Should Articles 3 and 4 of that Directive apply to photographs which are protected according to Article 49 of the Copyright Act, even though this is provided for by the Directive?*

Yes they should. Otherwise the effet utile of Articles 3 and 4 of the EU Copyright Directive (EUCD) would not be achieved.

- 2. Should the provisions of Articles 3 and 4 of the Directive be interpreted in the way that they apply to the use of all content which is accessible to everyone on the Internet without specific access restrictions?*

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<sup>1</sup> Hereinafter, the term works will generally refer to works and other subject matter which is protected by copyright law.

<sup>2</sup> Herein, the terms "limitations" and "exemptions" are used interchangeably without any distinction being made between the content of the terms.

Yes, this is a correct understanding of the obligations provided under Articles 3 and 4 EUCD. Furthermore, pursuant to Article 4, reservations should only be made in machine-readable format. For the exception to work as intended, and consistent with Recital 18, users seeking to mine content accessible online require reservations that are clear, unambiguous, and easily readable at scale and by AI tools. Any reservation of rights should be balanced against the general need to develop AI technologies and to access quality data, both of which have been highlighted by the European Commission.

In transposing Article 4, it would be helpful to make clear that general language on a website or in the terms and conditions should not be considered an appropriate means to make a reservation, whether or not the content is openly available on the internet. In addition, it would be useful to clearly set out that a “reservation” can be retracted by the rightholder at any time and that this retraction too should be done in a way that it is readable by AI tools. It is also critical to note that the Directive maintains that text and data mining (“TDM”) activities may be legitimate and non-infringing outside the scope of Article 4, whether it is because the activities are carried out to cover factual or other non-protected materials, an exception or limitation applies, or the activity was otherwise permitted. The reservations entered by a rightholder to prevent TDM should not create an obstacle for these alternative grounds for carrying out TDM activities.

Further, it would also be helpful to expressly state that reservations only apply going forward. Once TDM has been carried out, it is challenging, if not impossible, to remove a protected work from the entire output of a TDM process. For similar reasons, retaining copies of the data (within the limitations of the Directive) after a reservation has been entered should also be permitted to allow the continued reviewing and assessment of that particular TDM process.

**Ensuring the possibility to document TDM:** In addition, when transposing these articles, we recommend that users are given the ability to retain copies and to carry out reproductions in order to document, verify, and test outputs of TDM. This is consistent with the letter and spirit of the Directive, which does not suggest that TDM would be an infringement of copyright without the new exceptions. Rather, the Directive takes a broad approach to acts that are permitted under the new exceptions.

The ability to maintain records is also fundamental for documenting TDM in the commercial context. For instance, TDM may occur in the course of machine learning or developing AI systems. The governance and ethical use of these powerful and multi-purpose technologies necessitate care and effort. This may require that the datasets used in training a machine learning model or devising an AI system are documented, recorded, and reviewed. In our [“Perspectives on Issues in AI Governance,”](#) we highlight the need for explainability standards and approaches to appraising fairness in AI. For instance, given the complexity of AI, having a reliable explanation for why an AI system behaves in a certain way is important in boosting confidence and trust in the system itself. This includes documenting and auditing an AI system in a manner that allows the dataset to be reviewed. Such documentation also helps ensure accountability concerning the outputs of the AI system.

3. *What actions should be considered among the measures which rightholders should be allowed to apply “to ensure the security and integrity of the networks and databases”, cf. paragraph 3 of Article 3 of the Directive?*

No answer.

4. *Do Articles 3 and 4 of the Directive include the authority to put content on digital format in order to be able to use it in text and data mining? Is there a difference between Articles 3 and 4 in that respect?*

Yes. Articles 3 and 4 are not limited to digital or already “digitised” material. Not allowing digitisation of material for the purposes of performing TDM would go against the effet utile of the provisions. Articles 3 and 4 are harmonised, mandatory exceptions to the reproduction right that are not limited to digital uses.

Moreover, limiting the application of these provisions to digitised material would undermine the underlying purpose of these exceptions to support innovation and development of high quality machine learning and AI systems in Iceland. Crucial to the positive effects and correct outputs of such technologies is ensuring that they are trained on datasets free from bias. However, only permitting TDM on digital content risks creating arbitrary bias in datasets for machine learning, which in turn could lead to unpredictable biases in the outputs of systems trained on those datasets.

5. *How can a common standard for text and data mining be established?*

No answer.

6. *Does Article 3 in any case apply to entities other than research and cultural heritage institutions? This refers to whether public or private bodies working in partnership with such institutions can benefit from the exemption.*

No answer.

7. *What rules should apply to the conservation of copies which have been made based on the authorization provided by Articles 3 and 4?*

The Article 3 exception provides that copies “may be retained for the purposes of scientific research, including for the verification of research results.” Article 4 states that copies “may be retained for as long as is necessary for the purposes of text and data mining.” The retention period for storage of copies should be sufficiently flexible to take into account the varied purposes of TDM. A one-size fits all approach will not work.

In transposing, we propose that users be given the ability to retain copies and to carry out reproduction to document, verify, and test outputs of TDM. See further our response to question 2 above.

8. *Are there grounds for establishing specific rules regarding generally accepted best practices which rightholders, research institutions and cultural heritage institutions shall follow when implementing the obligations and measures provided for in paragraphs 2 and 3 of Article 3?*

No answer.

**Article 12: National extended collective licensing.**

According to Article 12, Member States may provide in their national laws for an extended collective licensing mechanism (contractual obligation) which may apply to national contracts in the field covered by the contractual obligation. Contractual obligation shall mean that it is established by law that the users of works protected by copyright who have concluded an agreement with a collective management organisation in the field of copyright for the use of the works of its members or their affiliates shall also be permitted to use the works of authors who are independent of such management organisation, provided that the works are of the same type as the works covered by the agreement, and that the use is in other respects subject to the provisions of the agreement. Among the conditions for this to be allowed are that the relevant management organisation adequately represents the rightholders of the relevant types of works and rights; that the authorization is only applied within areas of use where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical, that all rights holders are treated equally with respect to the terms of extended collective licensing agreements; that appropriate promotional measures are applied; that all rightholders who have not mandated the management organisation can exclude their works from the extended collective licensing agreement.

**Questions:**

29. *Article 26 (a) of the Copyright Act contains provisions concerning the requirements for management organisations in the field of copyright that may conclude extended collective licensing agreements. What changes might be needed with regard to the provisions of this Article as a result of the introduction of Article 12 of the Directive? What practical consequences can be expected to result from the introduction of Article 12 of the Directive.*

Article 12 should not have as a consequence that extended collective licensing (ECL) is broadened to new areas. Its legislative history shows that the provision was adopted chiefly to overcome doubts as to the permissibility of ECL following the decision of the CJEU in *Soulier* (C-301/15) . Moreover, the wording of Article 12 makes clear that ECL is only warranted in very narrow and specific circumstances. This takes account of existing licensing practices, which include direct licensing, e.g. with regard to films and photography, and collective, multi-territory licensing, and “transactional” licensing when it comes to music. It is notable that ECL licensing results in strictly territorial licenses, confined to the territory of the country whose government has recognised an extended effect to a license. ECL could thus negatively impact existing multi-territorial licenses and more generally disrupt existing licensing practices, fragment markets along national borders and increase licensing complexity and transaction costs. It should not be extended to new areas during the transposition without an ad hoc consultation and impact assessment.

30. *What is the best way to introduce the provisions of item d of paragraph 2 of Article 12 of the Directive regarding publicity measures? Should an obligation to report be imposed, and if so,*

*should then postponement effects apply to agreements until a certain period of time has elapsed?*

Since ECL effectively limits individual rightholders' ability to exercise their rights, it is important to ensure that rightholders are appropriately informed. However, it is equally essential to ensure that users are informed of rightholder opt outs so they too can operate with legal certainty. This issue is often overlooked although it is critical to the workability of ECL. ECL should not be broadened to new areas without due consideration of how rightholder opt outs can be workable for users.

**Article 13: Negotiation mechanism.**

According to Article 13, Member States shall ensure that an impartial party or body is in place to assist parties (users and rightholders) with the conclusion of agreements regarding the online availability of audiovisual works on video-on-demand platforms.

**Questions:**

*31. The term "video-on-demand services" is not defined in the Directive and is not a sufficient definition in EU law. Video-on-demand services come under item 2 of paragraph 4 of Article 2 of the Copyright Act. Is there a need to define the concept in further detail in the Copyright Act?*

When looking at the issue of video-on-demand services, it is essential that due regard is given to the recently revised Audiovisual Media Services Directive which seeks to define these services as on-demand audiovisual media services. We would therefore caution against introducing a new definition of VOD under this Act which could overlap and/or conflict with this EU-wide definition. Moreover the goal of EUCD is to harmonise the copyright legal framework across the EU and EEA in order to improve the functioning of the digital single market. Adopting potentially diverging national definitions for services covered by the Directive risks obstructing this objective. A verbatim transposition of Article 13 appears to be conducive of these objectives.

**Article 15: Protection of press publication.**

According to the provision, Member States shall provide publishers of press publications with exclusive rights to make copies and to digital dissemination of their publications on the Internet, which shall remain in effect for two years. In preambular paragraph 56 it is stressed that press publications contain mostly literary works, but increasingly include other types of works and other subject matter, in particular photographs and videos, see also Article 2 (4) of the Directive on what constitutes a press publication. The exclusive rights of publishers of press publications shall in no way affect the rights of authors and other rightholders with regard to their work which is included in press publications. Furthermore, this exclusivity does not apply to private or non-financial use by individuals, nor to the use of hyperlinking, nor to individual words or very brief extracts from newspaper articles. The authors of works incorporated in a press publication shall receive an appropriate share of the revenues that press publishers receive from service providers on the basis of this provision, cf. Article 15 (5) of the Directive.

## Questions:

35. *What is an 'appropriate share' according to Article 15 (5) of the Directive and who is to assess it? Courts of law or, for example, an appeals committee at the administrative level?*

No answer.

36. *How should the collection and distribution of the authors' share in accordance with Article 15 (5) of the Directive be handled? Could collective licensing be helpful in this regard?*

Please see answer to Question 37.

37. *What significance will the new protection provided for in Article 15 of the Directive have?*

Looking at its underlying purpose, Article 15 EUCD gives publishers of press publications more control while at the same time preserving the ability for everyone to discover, access, and share information online. On the one hand, it grants publishers of press publications the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC that they can exercise freely in relation to online uses by information society services. This simplifies the enforcement of their rights by dispensing with the need to prove "chain of title". On the other hand, the Directive provides additional safeguards with robust exceptions to those rights for hyperlinks, factual information, short extracts and use by individual users.

Article 15 does not provide publishers with a broader scope of protection than what they already enjoy on the basis of the copyright in the works contained in their publication (or the protection of their publication as a collective work or database). This allows the Dutch government, for example, to conclude that "an information society service provider may therefore continue to copy hyperlinks with newspaper headlines, several words or very short extracts including thumbnail photographs from a press publication, without the prior authorisation of the publisher."

To this end, compliance with the letter and spirit of Article 15 requires consideration of the following:

1. The rights introduced under Article 15 (1) EUCD are exclusive rights and not remuneration rights. This means that publishers are free to authorise or prohibit the reproduction and making available of their publications by information society services ("ISS"). They may also choose to waive their rights entirely. Therefore, the rights under Article 15 (1) EUCD cannot be subject to mandatory collective rights management, as Commissioner Breton also clarified in his response to [Parliamentary Question E-004603/2020](#). Similarly, the rights cannot be made subject to mandatory and binding arbitration as that too would go against their exclusive nature. Notably, these rights do not entitle publishers to remuneration. This is in line with Recital 82 of EUCD, according to which rightholders may exercise their rights freely without financial consideration.
2. **Short extracts:** The right in press publications should not prevent the use of headlines and titles, without which it is practically impossible to refer to an article or link to it.

Transposition should make clear that short extracts allow previews of content irrespective of the medium i.e. words, images (thumbnails), videos (short previews) etc.

Further, transposition should provide for a quantitative limit regarding the use of short extracts. ISS are the sole users of the Article 15 rights, which do not apply at all for example in relation to the acts of individual users. Thus ISS are the intended beneficiaries of the

exemptions (i.e. limitations to the scope of the rights, rather than exceptions) for hyperlinks and short extracts. The EU legislature clearly intended for ISS - including the “news aggregators” mentioned in recital 61 - to carry out acts of hyperlinking and reproduce and make available short extracts of press publications. In order to do so, and for the exemption to deploy its “effet utile”, ISS need legal certainty that their uses are allowed. Since they usually operate on a large scale, in circumstances where it is impossible to assess each use individually, this requires a quantitative “floor” below which they know their use is not infringing. While this could be expressed as a number of words (an approach previously taken in Germany), a character limit is more neutral and usable. Transposition should thus provide that uses of less than 200 characters are “short extracts” and do not come under the scope of the new right. Longer uses may of course be permissible. Such a limit is not only necessary to give effet utile to the exemption to publisher rights but is also permissible as it is only a “floor” and takes into account national linguistic specificities.

3. **Ownership of Content:** Publishers should own their own content, but they should not own everyone else’s. Preexisting material that is repackaged into new publications - such as photographs of breaking news events posted to social media, quotes from a public speech or report - should not be covered by ancillary rights, and press publishers should not be able to block other legitimate uses of content that the original copyright holder authorizes.
4. **Application in time:** As a practical matter, it is important to ensure that the rights are not applied retroactively. First, transposition cannot create any liability for acts carried out before entry into force nor indeed undermine any acquired rights. There should also be a sufficient delay for operators to adjust to the new rights. Second, publications published prior to entry into force should not be protected. The Directive prevents the protection of any publications published prior to June 2019, but it also allows Member States to only protect publications published from a later date, no later than the transposition deadline. This should be the preferred approach. Third, and finally, in order to account for the short term of protection and overlapping rights, transposition should condition protection on press publications that include a publication date, in order to compute the term of protection.

***Article 17: Use of copyrighted material by network service providers.***

The provision increases the liability of online content-sharing service providers on the Internet, as defined in item 6 of Article 2 of the Directive, and is intended to ensure that copyrighted content is shared on the content-sharing service with the permission of the rightholder or in another lawful manner.

Thus, it is stated in Article 17 of the Directive that providing access to copyrighted material on a content-sharing service constitutes a public performance or dissemination to the public, cf. Article 2 of the Copyright Act, by the providers of such services. It therefore obliges the provider of such services to obtain the authorisation of the rightholder, e.g. by means of agreements. The limitation of liability set out in Article 14 of Directive 2000/31/EC on electronic commerce does not apply to the cases covered by Article 17 of the Directive.

If the providers of online content sharing services have not obtained the consent of the rightholder, they will be deemed responsible for the unauthorized use that takes place through their content sharing service, unless they can show that they have made best efforts to obtain the consent of the

rightholder and also made best efforts to prevent unauthorized use of works on the content sharing service.

#### Questions:

39. *Article 17 covers content-sharing services that play an "important role on the online content market", "by competing with other online content services", see preambular paragraph 62. How shall this be assessed? Are there any content-sharing services in this country that fall under that definition?*

The Directive provides that the definition of online content-sharing service providers ("OCSSP") "should target only online services that play an important role in the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences."<sup>3</sup> This stresses the importance of the service on the **online content market** - not any market - and the need for that service to be **competing** with another online content service offering substantially the same type and quantity of copyright-protected works. In addition, the services must play an important role in these markets.<sup>4</sup>

In other words, Article 17 targets those user generated content ("UGC") services to which users upload and share third-party copyright controlled content that is also available on "non-UGC" content services licenced by rightholders. It requires that the relevant UGC services are targeted at, and derive their economic benefit from, sharing this specific content on their platform.<sup>5</sup> This is fundamental to Article 17's purpose to foster a system of rights management on UGC platforms that allows rightholders to protect the value of their works on UGC platforms without censoring speech and stifling creativity on UGC or other social media platforms.

For clarity, it would be helpful in transposition to explicitly limit the scope of Article 17 along these lines. Without this limitation, an overbroad definition would violate the Directive by catching a broad range of legitimate online content services for no reason, limiting their operation and the overall availability of content because of the heightened risk of allegations of copyright infringement. Online content services where users most often share works they created, or where users share their works under a Creative Commons licence, would be caught. For example, sharing images of traffic on a navigation app does not compete with licenced content services for the same audience of people. Nor does sharing images of a house or street on a real estate advertising platform; and nor does sharing a holiday video with family.

40. *Rightholders' organisations in Nordic countries expect that the introduction of the provisions of Article 17 of the Directive will lead to an increase in the rightholders' income. Has this been assessed? If not, how shall it be assessed?*

It is difficult to comment on the basis for the assessment referenced above.

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<sup>3</sup> Recital 62.

<sup>4</sup> This has been highlighted by the German government in its declaration.

<sup>5</sup> Art. 17, therefore, does not target blogs and similar communication platforms, regardless of whether or not users may upload third party content. These services do not promote the specific content for profit making purposes (Art. 2(6) of the Directive).

Viewing Article 17 through a lens of increasing rightholder income appears misplaced: the purpose of Article 17 is to facilitate a well-functioning licensing market place and to create strong incentives for all OCSSPs to use best efforts to negotiate with applicable rightholders in good faith and to remove and block their content if no agreement can be reached (provided that rightholders are also working in cooperation with OCSSPs to provide the relevant information they need). What Article 17 does not do, and does not advocate for, is the introduction of any new income rights, whether by way of the creation of direct remuneration claims against OCSSPs by creators (authors and performers) or their collecting societies (who already licence rights, for appropriate remuneration (Recital 61<sup>6</sup>), from rightholders), or otherwise.

Central to the new obligations created by Article 17 are "best efforts" cooperation between rightholders and OCSSPs, and in the light of the principle of proportionality. Article 17 does not attempt to force either rightholders or OCSSPs into a particular business model, nor require them to agree to specific commercial terms. Furthermore, the Directive does not impose a strict obligation to conclude an agreement, whether for an OCSSP or a rightholder, and actually contemplates that certain OCSSPs and rightholders may not be able to conclude agreements. Any agreements that are concluded should be "fair and keep a reasonable balance between both parties" and "contractual freedom should not be affected."<sup>7</sup>

We also note that Recital 61 is to be read in tandem with Recital 82, which expressly clarifies that rightholders should be able to authorise the use of their works for free. We propose that the balance between the two Recitals (61 and 82) may be evidenced in national law by stating that, while authors should receive appropriate remuneration for the use of their works or other subject-matter, nothing in the law should be interpreted as preventing them from authorising the use of their works or other subject-matter for free.

*41. What would be the best way to introduce the provisions of Article 17 (2) regarding the scope of licensing agreements? Possible implementations are: 1) By making it law that agreements between a content-sharing service provider and the rightholder shall also apply to the users of the content-sharing service, i.e. extending the agreement to them; 2) By introducing a restriction into the Copyright Act to the effect that the content-sharing service users may upload works included in agreements which the providers of the content-sharing service have made; or 3) By making it law that agreements between the provider of a content-sharing service and the rightholder must include provisions regarding the rights of users according to the agreement.*

Article 17(2) states that agreements between OCSSPs and rightholders should at a minimum cover acts of users who generate little revenue or who are not acting on a commercial basis. At the same time, the Directive maintains contractual freedom, allowing rightholders and OCSSPs to agree to cover any use of their protected content on a service - not just the limited use case referenced in Article 17(2). It would be helpful for the transposition to state clearly that OCSSPs and rightholders are permitted to agree to broader licensing terms.

*42. Is it permissible to further elaborate the obligation of content-sharing service providers to obtain authorisation pursuant to Article 17 (4), and should this be done? For example, if a*

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<sup>6</sup> Recital 61 mandates that rightholders should receive appropriate remuneration for use of their works.

<sup>7</sup> Recital 61.

*content-sharing service involves a large number of works of a certain type, it is then sufficient for the provider to conclude an agreement with a management organisation acting on behalf of the rightholder in the relevant field and a major party or does the provider of the content-sharing service also have to negotiate with minor parties? Can the content-sharing service provider be considered to have made “best efforts to obtain an authorisation” if they reject licensing agreements, for instance citing that the licensor’s demands for remuneration are too high?*

The Directive aims to bring about good faith negotiations and cooperation between OCSSPs and rightholders - not create an unworkable licensing burden - and seeks to ensure that OCSSPs that compete with other content distribution services for the same audiences must cooperate with rightholders, deploying their “best efforts” to give rightholders control over unlicensed user uploads and an opportunity to authorise and monetize such uploads. That said, OCSSPs cannot realistically be obligated to identify and contact each and every individual rightholder proactively, whose works could be included in a user upload as there is no possibility for OCSSPs to ascertain ownership of rights unless with the cooperation of the rightholders.

We propose that the transposition should make clear that rightholders must cooperate with OCSSPs in the authorisation process; for instance, by proactively coming forward to identify their works and demonstrate that they are the owner of these rights, and by providing OCSSPs with the “relevant and necessary information” (per Article 17(4)(b) and Recital 66) required to suitably identify their works.

The “best efforts” requirement does not create an obligation for an OCSSP or a rightholder to agree to any terms. If an OCSSP approaches a rightholder requesting a licence, the rightholder is not obligated to grant a licence on the terms that are proposed. Conversely, if a rightholder approaches an OCSSP and proposes licensing terms, the OCSSP does not have to accept them. Any transposition of Article 17 should therefore ideally clarify that it does not create an obligation to take or grant a licence. This is supported by Article 17(8), which outlines two scenarios: one where no authorisation is granted (thus the cross-reference to paragraph 4), and another where licensing agreements are concluded between OCSSPs and rightholders.

Finally, it appears important to keep in mind when transposing Article 17 that “best efforts to seek an authorisation” only imposes a **proportionate** obligation on OCSSPs in accordance with Article 17(5). This limits the categories of works, uses, and circumstances under which an OCSSP is required to seek an authorization.

*43. Content-sharing service providers shall disable access to, or remove from their websites, the works or other subject matter regarding which they have received notice from the rightholders, cf. item c of paragraph 4 of Article 17, and ensure that users are able to upload content which they are permitted according to the restrictions that apply to copyright, cf. paragraph 7 of Article 17. Certain methods of disabling access to illegal content will, in practice, also potentially prevent users from uploading legal content. Consequently, the Directive presupposes that an assessment of the interests involved must be carried out with regard to the use of such methods, i.e. an assessment of interests balanced against the importance of disabling access to illegal content pursuant to Article 17 (4) and the possibility that such action may impede the ability of users to upload legal content pursuant to Article 17 (7). What should be the points of reference in such an assessment of interests?*

In striking the right balances of interests, it is critical to take into account the following:

**“Best efforts” requires rightholder cooperation:** This requirement is explicit in the Directive<sup>8</sup> and reinforced by the multiple references to “cooperation” throughout Article 17. OCSSPs cannot take action without accurate, “digitally tangible,” information about “who owns what” as a prerequisite. Rightholders should provide clear and actionable data, including files in a digitally tangible format to enable the specific identification of such copyright-protected works on the service using available technologies, thereby enabling OCSSPs to be able to take action.

**There is no liability without actionable data:** The absence of such data means that the OCSSPs should not be liable for works for which no data or incomplete data have been provided. This provision of the Directive is critically important for transposition, and the Court of Justice (C-401/19) also pointed out that such cooperation is a precondition for any liability of the OCSSPs (para 89). The law should also make clear that OCSSPs are not obliged to agree to requests from rightholders who repeatedly provide incorrect information. The use of incorrect data in content recognition tools has immediate negative consequences for other rightholders, who may own those rights, and for users.

**Choice and type of measures:** The Directive does not mandate any specific technological solution.<sup>9</sup> This is sensible. While “filtering” is often used as the only example of measures that can satisfy Article 17, it should remain open to other approaches (e.g. repeat infringer policies). This approach has recently been reaffirmed by the Court of Justice in Republic of Poland, C-401/19, where it expressly mentioned that within the context of Article 17, there is a need to respect the freedom to conduct a business of the platforms as enshrined in Article 16 of the EU Charter of Fundamental Rights (Charter). In particular, it follows from Article 16 of the Charter that it may even “*prove necessary ... to leave service providers to determine the specific measures to be taken in order to achieve the result sought; ... they can choose to put in place the measures which are best adapted to the resources and abilities available to them and which are compatible with the other obligations and challenges which they will encounter in the exercise of their activity*” (citing UPC Telekabel Wien, C-314/12, para 52) (para 75).

Moreover, the Directive does not oblige OCSSPs to implement technologies that would amount to general monitoring<sup>10</sup> because the prohibition under Article 15 of the E-commerce Directive (“ECD”) still applies. We again refer to the Court of Justice’s guidance in C-401/19 at para 90, where the Court stresses that Article 17, and in particular Article 17(8), does not give rise to a general monitoring obligation - this being one of the safeguards under Article 17 to ensure that the users’ fundamental rights to freedom of expression and freedom of information are observed. This limitation should, therefore, be carefully maintained in transpositions of Article 17 in order to strike a fair balance between the fundamental rights concerned, namely freedom of expression and information, right to

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<sup>8</sup> Recital 66: “Where rightholders do not provide online content-sharing service providers with the relevant and necessary information on their specific works or other subject matter, [...] and, as a result, those service providers cannot make their best efforts to avoid the availability of unauthorised content on their services, in accordance with high industry standards of professional diligence, such service providers should not be liable[...].”

<sup>9</sup> Recital 66, second para: “Different means to avoid the availability of unauthorised copyright-protected content could be appropriate and proportionate.”

<sup>10</sup> Id.: “In addition, the obligations established in this Directive should not lead to Member States imposing a general monitoring obligation.”

intellectual property and the right to conduct a business (see C-401/19, at para 99). The Court concludes, *inter alia*, that any filtering system which might not distinguish adequately between unlawful and lawful content would be incompatible with the right of freedom of expression and information, guaranteed in Article 11 of the Charter (para 86). In order to safeguard the right of expression and information of the users, the Court points out that OCSSPs cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment by the OCSSPs in the light of the information provided to them by the rightholders and of any exceptions and limitations to copyright (para 90).

Similarly, the Court also stresses that OCSSPs should not have to conduct any “detailed legal examination” (see para 91). The Court’s comments echo and reaffirm the Advocate General’s guidance that OCSSPs shall not be in a position of judges. *Inter alia* the AG pointed out in his opinion that “*in order to minimize the risk of ‘over-blocking’, and, therefore, ensure compliance with the right to freedom of expression, an intermediary provider [...] may only be required to filter and block information which has first been established by a court as being illegal or, otherwise, information the unlawfulness of which is obvious from the outset, that is to say, it is manifest, without, inter alia, the need for contextualisation.*” (para 198) or: “*It is not for those providers to decide on the limits of online creativity, for example by examining themselves whether the content a user intends to upload meets the requirements of parody. Such delegation would give rise to an unacceptable risk of ‘over-blocking’. Those questions must be left to the court*” (para 203; c.f. also para 201 and 218)).<sup>11</sup>

**Notice and takedown must remain workable:** The tried and tested notice and takedown process remains applicable and may be the only effective and proportionate means to comply with Article 17 in some circumstances.<sup>12</sup> Under this framework, a rightholder notifies an OCSSP of a particular item of content upload in a manner sufficiently precise to allow the OCSSP to locate the file (e.g. a url) and with sufficient justifications to substantiate their claim;<sup>13</sup> the OCSSP will then disable access to the file. The Directive could bring legal uncertainty to the notice and takedown process because it refers to “works” instead of “data” or “uploads.” Takedown notices must identify at least a specific upload (i.e. a file, typically with a url) and trigger the removal of that specific file. As pointed out above, the CJEU stressed that notifications must contain “sufficient information” to enable the OCSSP “to satisfy itself, without a detailed legal examination, that the communication at issue is illegal and that removing that content is compatible with freedom of expression and information (C-401/19, para 91).

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<sup>11</sup> See also: Opinion of the Advocate General in C-401/19: To “some extent, the legislature has delegated to [OCSSPs] the task of monitoring the proper application of copyright in the digital environment. The legislature cannot delegate such a task and at the same time shift all liability to those providers for the resulting interferences with the fundamental rights of users” (at para 84). Footnote 92 of the Advocate General’s Opinion: “the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.”

<sup>12</sup> *Id.*: “[I]t cannot be excluded that in some cases availability of unauthorised content can only be avoided upon notification of rightholders.”

<sup>13</sup> See, e.g., C-324/09, *L’Oreal v. Ebay*, para 122; European Commission, Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, C(2018) 1177 final, Point 17 (January 3, 2018), available at [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=50095](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50095); European Commission, Tackling Illegal Content Online, Towards an enhanced responsibility of online platforms, COM(2017) 555 final, para 3.2.2, available at <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-1.PDF> (specifically calling out the need for a url).

44. *To what extent does the Directive permit content sharing service providers to use automated methods, including automatic filters, in order to disable access to content regarding which the rightholders have sent notification pursuant to item c of paragraph 4 of Article 17? Is there a risk that such automatic methods will effectively impede the upload of legal content pursuant to paragraph 7 of Article 17?*

The question suggests that Article 17(4)(c) creates a standalone obligation to implement filtering solutions. However, Article 17(4) does not create a standalone “stay down” obligation: it merely requires OCSSPs to offer to cooperate in accordance with Article 17(4)(b). In this context, we refer to the guidance of the Court of Justice in C-401/19, whereby the Court stressed that the blocking obligations under Article 17(4)(b) and (c) are “limited” to “best efforts”; the obligation to prevent overblocking under Article 17(7) is however absolute and prescribes a specific result (see paras 76, 78).

That said, while the Directive prohibits Member States from requiring OCSSPs to take measures which would amount to general monitoring, it does not prevent OCSSPs from using “filtering technology” “provided that the service providers have received from the rightholders the information or notices provided for” in Article 17(4)(b) and (c) (i.e. “relevant and necessary information”, (cf. C-401/19, para 54).

Such prior review and filtering of content constitute a limitation of freedom of expression and freedom of information of users (see C-401/19, paras 55, 58). Even the most sophisticated filtering technology cannot ascertain ownership of copyright and chain of title, nor subsistence of copyright (e.g. someone claims to copyright own bird songs), nor originality, nor applicability of exceptions. In other words, such tools can “match” two files as containing content that is similar to human perception, but not make any determination of infringement (in this sense, “copyright enforcement tools” is thus a misnomer).

When misused, because it is automated and operates at scale, content recognition can thus quickly impact a large number of uploads and detrimentally impact users as well as rightholders. In our view, it is thus important to allow platforms to take reasonable measures against rightholders who misuse or abuse automated content recognition. This might include suspending their use of content recognition. Further, legal sanctions would also help minimise misuse (as has been enacted in Section 18 of the German transposition). To further mitigate risk, the complaint procedure should put the onus on rightholders to review content manually and demonstrate infringement, once the user has filed their complaint (see below).

45. *Restrictions to copyright that concern citations, criticism, art or literary reviews, cf. Article 14 of the Copyright Act, as well as use of cartoons, caricatures or other forms of imitation have so far been considered optional for Member States. The Directive makes these restrictions compulsory. Do paragraphs 2 and 7 of Article 17 result in a need to amend the Icelandic Copyright Act?*

No answer.

46. *In view of the fact that Article 17 is not included on the list in Article 23 of the Directive regarding provisions which may not be derogated from by agreements, would providers of*

*content-sharing services be allowed to include provisions in their agreements that other terms and conditions shall apply to the use of their services other than those deriving from the provisions of Article 17?*

Article 17(1) states that OCSSPs should “obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC”. Such agreements should be “fair and keep a reasonable balance between both parties” and “contractual freedom should not be affected” (rec. 61; see also Case C-401/19, paras 8, 48 ). Contractual freedom (freedom to conduct a business) is protected under Article 16 of the Charter and includes the freedom not to conclude a contract.

We propose that Iceland’s transposition of Article 17 should not cut across: (i) existing licensing agreements that OCSSPs already have in place with rightholders; and (ii) the parties' freedom to negotiate by restricting OCSSPs’ and rightholders’ ability to freely negotiate and enter into - or not enter into - contracts (cf C-401/19, at para 48): *“the Court points out that rightholders are free to determine whether and, if so, under what conditions, their works and other protected subject matter are used. As recital 61 of Directive 2019/790 states, contractual freedom is not affected by that directive, and those rightholders are, therefore, in no way obliged to give authorisation or to conclude licensing agreements for the use of their works in favour of online content-sharing service providers.”*

47. *How should arrangements be made for resolving out-of-court cases on the basis of paragraph 9 of Article 17? Who should pay the litigation costs?*

While the Directive requires OCSSPs to put in place a mechanism for dealing with user complaints and providing them redress, it also requires that Member States ensure that users also have access to out-of-court redress mechanisms to settle disputes and that users have access to a judicial authority to assert the use of an exception.

#### **Complaint and redress mechanism of Article 17(9)**

The “complaint and redress mechanism” (OCSSP requirement) and the out-of-court dispute resolution and judicial redress (Member State requirements) are separate processes. The “complaint and redress mechanism” requires an OCSSP to intermediate between the rightholder, who is claiming that content should be disabled, and the user, who is claiming it is a legitimate use. Consequently, rightholders must justify their requests in response to user complaints. The Directive, however, does not require OCSSPs to act as judge and adjudicate the dispute: that is the role of the courts and judicial processes. OCSSPs should play no part whatsoever in relation to the out-of-court dispute and judicial redress mechanisms, which are the responsibility of each Member State to provide.

There are potentially arguments that the country of origin (CoO) principle could apply to the provisions of the “complaint and redress” mechanism of the OCSSP as, otherwise, OCSSPs (and rightholders and users) will have to deal with contradictory requirements under various national laws. This is particularly important as content sharing platforms tend to be designed for the sharing of users’ own content on a global scale. Different complaint mechanisms in each EU country where an upload is available would be illogical and would likely cause significant practical challenges, which could be both confusing and ultimately detrimental to rightholders and users.

There is room for national transpositions to set out further “default rules” that will protect users. For instance:

- Rightholders should respond to user complaints forwarded to them under the complaint mechanism, and in so doing, should substantiate their claim and conduct a human review of the upload. Thus, human review should not be carried out by the OCSSP as the rightholder alone can establish whether the upload is licensed or whether it is worth their trouble of responding.
- When rightholders do not respond or justify their claim, the upload should be reinstated.
- If a rightholder responds, and the user maintains their complaint, the onus should be on the rightholder to bring proceedings before alternative dispute resolution (“ADR”) or a court to enforce their rights. Should they decline to do so, the upload should be reinstated.
- Whether OCSSPs reinstate an upload or not, they should not be liable. This is in line with Article 17, as services which comply with Article 17(4) are not liable for copyright infringement in uploads.

Automation of a complaints and redress mechanism will likely result in some errors. YouTube currently has in place a complaint mechanism that ensures that users can object if they believe that their content has been removed wrongfully due to a copyright complaint. This mechanism has proven to work well in practice. If a video has been removed due to a copyright notice, the uploader may submit a legal request for YouTube to reinstate the video (“Counter Notification”). If the rightholder fails to file a lawsuit within a certain period of time, the video gets reinstated. Likewise, Content ID offers a dispute proceeding that allows users to contest claims made on their video. Although the amount of complaints contested across both these processes makes up only a very small proportion of the use of the systems, they protect against overreaching or mistaken complaints.

#### **Alternative dispute resolution under Article 17(9)**

In order to be effective, ADR should be quick, accessible, and cheap. Given that the disputes in question are essentially disputes between a rightholder seeking to enforce their copyright on a platform on the one hand, and a user claiming their use is legitimate on the other, it may be possible that either of these parties bear part of the costs. However, this may prove dissuasive for users. If ADR is effectively provided by a state body, funded by the state, and does not require legal representation, there may also be no costs for users.

*Finally, it is proper to reiterate that interested parties are free to submit further comments and suggestions, even if they do not concern individual questions.*

#### **Further comments and suggestions Google wishes to make:**

##### **Verbatim transposition**

In order to facilitate maximum harmonization for the benefit of rightholders, OCSSPs, and users, and in line with recent EU case law, Google respectfully requests that Iceland exercises caution to ensure that its transposition aligns with the Directive, and does so in a manner that does not inadvertently fetter underlying fundamental rights or other critical principles, such as the principle of

proportionality<sup>14</sup>. This is important to ensure that the delicate balance struck by Article 17 as between rightholders and OCSSPs - both in terms of rights and service functionality (such as the complaints and redress mechanisms) - is maintained, and the risk of further fragmentation in this respect across Europe, mitigated.

### **“Best efforts” translation**

It is critical that, as recommended by both EU authorities and academic research, and as correctly implemented by EU Member States, the Icelandic transposition remains consistent with the text and spirit of the Directive and uses either a literal translation of “*best efforts*” - “*besta viðleitni*” - or the expression “*hæfileg viðleitni*” (“*reasonable efforts*”).

Under Article 17(4), service providers are required to obtain permission from rightholders when reproducing or making available protected works. If such permission is not granted by the rightholders, service providers will only be held liable if they cannot prove that they have made “*best efforts*” to obtain such permission and to ensure that these protected works are not available. Unfortunately, as pointed out by academic research, several language versions of the Directive contain a manifest mistranslation of the English term “*best efforts*”, English being the language of the negotiations of the Directive.<sup>15</sup> In those versions, the phrases “*all*” or “*greatest*” efforts or other local expressions have been incorrectly used.<sup>16</sup>

Yet, the European Commission’s Guidance on the implementation of Article 17 has further unequivocally stated that “*The notion of ‘best efforts’ is not defined and no reference is made to national law, hence it is an **autonomous notion of EU law** and it should be transposed by the Member States in accordance with this guidance and interpreted in light of the aim and the objectives of Article 17 and the text of the entire Article*” (emphasis added).<sup>17</sup> As such, **it is of capital importance that “best efforts” is transposed literally into national law** so as to ensure its **harmonisation and homogeneity** across all Member States, and that Member States do not seek to align it with other notions or standards which may exist under national law. The Commission has further stressed that “*the notion of ‘best efforts’ is an autonomous notion of EU law*” and “*as indicated in the guidance, [...] needs to be read in light of the principle of proportionality*” and “*therefore [...] **should not be understood as maximum possible efforts***” (emphasis added).<sup>18</sup> On three other occasions, the Commission stated that it **should rather be understood as “reasonable efforts”** and **should be**

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<sup>14</sup> See Court of Justice in C-401/19, para. 99.

<sup>15</sup> Larroyed, Aline, When Translations Shape Legal Systems: How Misguided Translations Impact Users and Lead to Inaccurate Transposition – The Case of ‘Best Efforts’ Under Article 17 DCDSM (November 30, 2020). Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3740066](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3740066)

<sup>16</sup> *Ibid.*

<sup>17</sup> Communication from the Commission to the European Parliament and the Council: Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM(2021) 288 final, available at: <https://digital-strategy.ec.europa.eu/en/library/guidance-article-17-directive-2019790-copyright-digital-single-market>.

<sup>18</sup> Letter by the European Commission’s Directorate-General for Communications Networks, Content and Technology (DG Connect) to Allied for Startups, ACT | The App Association, Bitkom, The Computer & Communications Industry Association (CCIA Europe) and EuroISPA – The pan-European association of Internet Services Providers Associations, June 18, 2021.

**translated literally** to be more consistent with EU lawmakers' intent.<sup>19</sup> Otherwise this would give rise to a significant risk of **over-blocking**.<sup>20</sup>

The **Court of Justice of the European Union** has long settled the principle that autonomous concepts of EU law must be given an **independent and uniform interpretation throughout the EU**.<sup>21</sup> In order to facilitate the work of national courts in complying with this rule of EU law, Member States must be careful to **avoid blurring the lines between autonomous notions of EU law and standards of national law** in their implementation efforts.

In line with this objective, academic research recommends using **literal translations** of the "*best efforts*" standard - even if it "*may imply foreignization, in the sense of bringing an unusual expression to the target language*".<sup>22</sup> This is consistent with other language versions of the Directive other than English, namely Danish ("*bedste indsats*"), Finnish ("*toteuttaneet toimia parhaansa*"), French ("*meilleurs efforts*"), Gaelic ("*sàrdhicheall*"), Maltese ("*l-aħjar sforzi*") and Slovenian ("*si po najboljših močeh prizadevali*"). It is also consistent with transposition bills **as amended by governments that were confronted with mistranslation issues** in their language version of the Directive including **the Belgian, Croatian, Czech, Dutch, Estonian, German, Lithuanian and Romanian governments** which rightly replaced the inaccurate words "*all*" and "*greatest*" **with literal translations of "*best*"** ("*beste*", "*najbolje*", "*nejlepši*", "*beste*", "*parim*", "*bestmögliche*", "*geriausias*" and "*cele mai bune*").

**Alternatively**, academic research also recommends the use of the expression "**reasonable efforts**", which also correctly expresses the intent of the EU legislator.<sup>23</sup> This is consistent with the Directive's requirements and the interpretation of "*best efforts*" in commercial practice, understood as a **reasonable and proportionate** effort in relation to what a diligent operator would do.<sup>24</sup>

Other wordings would be **misleading for local courts and stakeholders** by wrongly suggesting that a **different local standard** should be implemented in Iceland. This would risk platforms stopping users from posting a whole host of content by having to take an **overly broad view** of what could be caught by this measure to guard against penalties and unknown liabilities. Moreover, it would be highly detrimental to **harmonisation** and - as also pointed out by academic research - could lead to "*a*

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<sup>19</sup> European University of Rome, Jean Monnet Chair in EU Innovation Policy, Dec. 16, 2020 Webinar on "Direttiva Copyright tra proporzionalità e best effort. I nodi da sciogliere", available at <https://www.youtube.com/watch?t=1469&v=nnnsOJOCBxQ&feature=youtu.be>

Medialaws, April 29, 2021 Webinar on "Il recepimento della Direttiva Copyright in Italia e il nodo della clausola di best efforts", available at <https://www.youtube.com/watch?v=owUE42UjJbU&t=135s>

And UNIDROIT - International Institute for the Unification of Private Law, Feb. 22, 2022, Conference on "Il recepimento della direttiva copyright: il caso italiano in una prospettiva comparata ed europea", Rome.

<sup>20</sup> *Ibid.*

<sup>21</sup> See for example cases C-467/08, Padawan, para. 32, and C-201/13, Deckmyn, paras. 14-19.

<sup>22</sup> Larroyed, Aline, *op. cit.* See also Bassini, Marco and De Gregorio, Giovanni, "The Implementation of the Copyright Directive in Italy and the Proper Understanding of the 'Best Efforts' Clause", Medialaws, 29 March 2021, available at <http://www.medialaws.eu/wp-content/uploads/2021/04/Policy-paper-ML-Article-17-and-best-efforts-5.pdf>

<sup>23</sup> *Ibid.*

<sup>24</sup> Article 17(5); Recital 66, para 2: "*Any steps taken by service providers should be effective with regard to the objectives pursued but should not go beyond what is necessary.*" On the interpretation of "*best efforts*" in commercial practice see Art. 5.1.4 UNIDROIT Principles 2016.

*fragmented Digital Single Market” and, by setting up different expectations from parties, “to unnecessary disputes”.*<sup>25</sup>

For all these reasons, as recommended by both EU authorities and academic research and in line with the approach taken by Member States, we respectfully suggest to use in transposing Article 17 (4) either the literal translation of “best efforts” - “**besta viðleitni**” - or the expression “**hæfileg viðleitni**” (“reasonable efforts”).

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<sup>25</sup> Larroyed, Aline, *op. cit.* See also Bassini, *op.cit.*