Brussels, 14th of September 2020

To: Commissioner Breton, Internal Market, European Commission

Dear Commissioner Breton,

On behalf of the undersigned civil society and users' organisations, which are participating in or closely following the Commission's Stakeholder Dialogue on the implementation of Article 17 of the Directive on Copyright in the Digital Single Market, we are writing to you to summarise the key concerns that we have expressed in our responses to the targeted consultation that closed on the 10th of September.

We sincerely value the opportunity to provide our feedback to the proposed content of the Article 17 guidance that is being drawn up by the Commission based on the input gathered during the stakeholder dialogue to which we have contributed. In our view the consultation document illustrates a clear commitment of the Commission to maintain the delicate legislative balance of Article 17, and we are pleased to see that it reflects many of the constructive contributions that have been made by stakeholders across the spectrum during the dialogues in light of the grave fundamental rights concerns raised by Article 17.

However, we remain deeply concerned that the guidance endorses the use of automated content blocking by online services even though it is clear that this will lead to the violation of fundamental rights. Given this endorsement, the proposed guidance does not take away our concerns that implementations of Article 17 based on the proposed guidance would violate established principles of EU law.

That being said, we very much welcome the clarification that Member States should not mandate the use of technology or impose any specific technological solutions on service providers to comply with their obligations under Article 17.

Safeguards for legitimate uses of content and redress mechanism for users

In light of the fact that the proposed guidance explicitly acknowledges that service providers will rely (or continue to rely) on technological tools in order to comply with their obligation under Article 17, we would like to highlight the following elements from our responses:

- We support the explicit recognition that the complaint and redress mechanism established by Article 17(9) is not a sufficient safeguard for user rights and that both 17(7) and 17(9) must be implemented into national laws to ensure that legitimate uses of content will be protected from deletion at the time of upload.
- We are concerned that the "likely infringing" standard for uploads that would not require an ex-ante review is too permissive. Article 17 requires that all legal uses remain online, not only those that are “likely legitimate” according to a superficial screening that is unlikely to reflect the complexity of copyright law. At minimum, the standard for the deletion of content should be "manifestly infringing".
- In this context, it is essential that uploads that are not manifestly infringing remain available until the human review has been concluded. From our perspective this element is of central importance for protecting users' freedom of speech and freedom to impart and receive information and without this protection the threshold-based approach outlined in the consultation would be entirely meaningless.
- In addition, it is unacceptable that the criteria for determining if the standard is met would be agreed between rightholders and service providers, without representation of users, whose fundamental rights are at stake. We recall that article 17(10) explicitly mentions users' organisations as stakeholders in the context of the collaboration between service providers and rightholders.
- The guidance appears to focus on the development of criteria to try to identify legal uses of protected content under exceptions and limitations to copyright, but fails to propose safeguards to prevent the removal of legal uses of content for which the uploader has a license or which is in the public domain. This issue should be addressed through a combination of pre-flagging and public databases of public domain and openly licensed content.
- We welcome the proposal that the guidance should include transparency requirements. Transparency of technical parameters and outcomes as well as the public availability of ownership claims will be essential for understanding the impact of Article 17 on users' rights.
- Finally, the guidance must include more emphasis on the measures against abuse of the mechanisms introduced by Article 17 by bad-faith actors or parties that are structurally negligent. Without such measures, implementations of Article 17 will open the door for structural abuses of user rights.

Other aspects

We strongly support the clarification that Article 17 constitutes a "lex specialis" to the provisions of the InfoSoc Directive and that Member States should include the notion of ‘authorisation’ for the lex specialis ‘act of communication to the public’ in Article 17(1). This

approach provides Member States with maximum flexibility to adapt their national legislation to the specificities of their national legal systems.

We further support the fact that the guidance should recall that the objective of Article 17 is authorization. Given this objective, the guidance should explicitly endorse forms of authorization other than licenses, including remunerated exceptions.

Please refer to our respective submissions to the consultation for more details on the issues highlighted above. We hope that our feedback will contribute to arriving at a final version of the guidance that maintains the legislative balance achieved by the European legislator, including substantial safeguards for users' fundamental rights. We see the proposals outlined in the consultation document as an important step into this direction and we remain at your disposal should you require additional input from us.

Signatories:

1. ANSOL - Associação Nacional para o Software Livre
2. Antigone
3. ApTI Romania
4. ARTICLE 19
5. Centrum Cyfrowe
6. Civil Liberties Union for Europe
7. COMMUNIA
8. Creative Commons
9. D3 - Defesa dos Direitos Digitais
10. Digitale Gesellschaft
11. Digital Rights Ireland
12. Electronic Frontier Foundation (EFF)
13. Epicenter.works - for digital rights
14. European Digital Rights (EDRi)
15. Gesellschaft für Freiheitsrechte e.V
16. Hermes Center
17. Human Rights Without Frontiers
18. Intellectual Property Institute, IPI
19. International Council on Archives (ICA)
20. International Federation of Library Associations and Institutions (IFLA)
21. Iuridicum Remedium (IuRe)
22. La Quadrature du Net
23. #noisiamorete
24. Rights International Spain (RIS)
25. Wikimedia
26. XNet
27. Young Pirates of Europe