

LAW SOCIETY SUBMISSION



SUBMISSION ON THE TRANSPOSITION OF THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

DIRECTIVE (EU) 2019/790 ON COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL SINGLE MARKET AND AMENDING DIRECTIVES 96/9/EC AND 2001/29/EC

DEPARTMENT OF BUSINESS, ENTERPRISE AND INNOVATION

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1 Introduction

- 1.1 The Law Society of Ireland is pleased to respond to the Department of Business, Enterprise and Innovation's ("DBEI") consultation on the transposition of Directive (EU) 2019/790 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (the "DSM Copyright Directive"). Consultation Paper No.1: Articles 13 to 17.
- 1.2 The Law Society of Ireland is the representative organisation for the solicitors' profession in Ireland. Our members provide legal advice in respect of intellectual property matters, including to all of those various stakeholders interested in the DSM Copyright Directive.
- 1.3 Because Ireland is at the forefront of technology and creativity, both of which are of strategic, societal and economic importance, it is vitally important that the legal and regulatory framework put in place is precise, balanced and robust. The Law Society supports and advocates for the development of a legal and regulatory environment which is clear and consistent, which is fully fit for purpose and which is recognised throughout the EU as achieving best practice.

2 Overview of Articles 13 to 17: Recitals 51 to 74: Press Publishers and the Value Gap

- 2.1 The DBEI's Consultation Paper states that "among the Directive's many proposals are provisions aimed at ensuring greater rights for press publishers seeking to protect their content online" (Article 15) and measures to address the "value gap" whereby rightsholders are receiving less remuneration despite the increased usage of their works (Article 17). The Law Society accepts the thrust of the DBEI's descriptions on the aims of the DSM Copyright Directive and does not wish to restate the arguments which occurred during the passage of the DSM Copyright Directive through the EU institutions.
- 2.2 Our primary concern is that in the provisions and language of the implementation legislation, clarity and precision of legal expression is as far as possible achieved, so that the clients that solicitors in Ireland advise will be able to operate in the Digital Single Market with the greatest amount of legal certainty and that the "laws of Ireland" will be respected and used in international contractual and other arrangements as well as in the resolution of any disputes that do arise.
- 2.3 While the DSM Copyright Directive contains a framework for recalibration of rights and interests of stakeholders, in some places the detail about how this framework will operate in practice is quite light. For that reason the Law Society would like the DBEI, once it has completed the current round of consultations, to publish the draft legislation for further comment by stakeholders.

3 **Article 13 – Negotiation Mechanism**

3.1 Extract from the DSM Copyright Directive - Article 13:

Negotiation mechanism:

Member States shall ensure that parties facing difficulties related to the licensing of rights when seeking to conclude an agreement for the purpose of making available audiovisual works on video-on-demand services may rely on the assistance of an impartial body or of mediators. The impartial body established or designated by a Member State for the purpose of this Article and mediators shall provide assistance to the parties with their negotiations and help the parties reach agreements, including, where appropriate, by submitting proposals to them.

Member States shall notify the Commission of the body or mediators referred to in the first paragraph no later than 7 June 2021. Where Member States have chosen to rely on mediation, the notification to the Commission shall at least include, when available, the source where relevant information on the mediators entrusted can be found.

3.2 Extract on Article 13 taken from the DBEI Consultation Paper:

Article 13 establishes a negotiation mechanism for parties seeking to conclude agreements on the making available of audio-visual works on video-on-demand platforms. Where the parties face difficulties relating to the licensing of rights, they may seek the assistance of an impartial body or mediators. This body can be newly established for the purposes of this Directive or can be an existing body that fulfils the conditions established by this Directive.

Participation in this negotiation mechanism is voluntary and does not affect the contractual freedom of any of the parties involved. Article 13 will help facilitate the licensing of rights and encourage the availability of European content on video-on-demand platforms. Views of stakeholders on how such a negotiation mechanism could operate in Ireland, including the potential for using any existing bodies or mechanisms in the sector and the expected burden of activity and additional costs arising, would be welcomed by relevant stakeholders.

Law Society Submission in respect of Article 13(6)

3.3 In “The DSM Copyright Directive - EU copyright will indeed never be the Samei”, Ted Shapiro and Sunniva Hansson write that, while there is a limited risk of undermining ordinary negotiations, at this juncture, the practical impact of Article 13(6) appears likely to be negligible. The Law Society tend to agree, given the size of this particular market in the Irish market.

3.4 The Law Society suggests that the DBEI consider relying upon either utilisation of the skills of already qualified mediators in the Irish market, many of which are

members of the Law Society and/or the Institute of Mediators; and/or statutory agencies involved in the sector.

4 Article 14 – Works of visual art in the public domain

4.1 DSM Copyright Directive - Article 14:

Works of visual art in the public domain:

Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.

4.2 Extract on Article 14 taken from the DBEI Consultation Paper:

Article 14 clarifies that any material resulting from copying a work of visual art in the public domain will not be subject to copyright, unless that resulting material is the author's own intellectual creation. This would prevent people from claiming the copyright in works that have already entered the public domain. This harmonised provision will help address cross-border legal uncertainty in the EU and ensures that faithful reproductions of works in the public domain can be used to promote culture and cultural heritage.

Law Society Submissions on Article 14

4.3 The Law Society agree that Article 14 is clarificatory in nature. Account must be taken of the current provisions in the Copyrights and Related Rights Act 2000 (CRRA) that already adequately deal with the concept of works entering into the public domain.

4.4 Care must be taken to ensure that any implementation of Article 14 clearly differentiates acts of reproduction of visual arts which produce works that are not subject to copyright or related rights, from those that could be considered original in the sense that it is the author's own intellectual creation, and that attract new rights.

4.5 The Law Society do not think that this is a new concept, but merely alludes to the fact that the new work must meet the requirements of originality already existing in Irish copyright law.

5 Article 15 – Protection of press publications concerning online uses

5.1 DSM Copyright Directive - Article 15:

Protection of press publications concerning online use:

1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2ⁱⁱ and Article 3(2)ⁱⁱⁱ of Directive 2001/29/EC for the online use of their press publications by information society service providers.

The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.

The protection granted under the first subparagraph shall not apply to acts of hyperlinking.

The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.

2. The rights provided for in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject matter incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated.

When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired.

3. Articles 5 to 8 of Directive 2001/29/EC, Directive 2012/28/EU and Directive (EU) 2017/1564 of the European Parliament of the Council shall apply *mutatis mutandis* in respect of the rights provided for in paragraph 1 of this Article.
4. The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published.
5. Paragraph 1 shall not apply to press publications first published before 6 June 2019.
6. Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

5.2 Extract on Article 15 taken from the DBEI Consultation Paper:

1. Article 15 of the Directive establishes a neighbouring press publishers' right, which would allow press publishers to seek remuneration for the online exploitation of their works by news aggregators. The additional revenue generated by this new right will help to ensure a free and pluralist press, allowing the Irish public to consistently access reliable news sources.
2. The definition of "press publishers" is contained in article 2(4) with some guidance on this definition provided in recital 56. It clarifies that both digitised and born-digital publications are covered. It also clarifies that this is a collection of works of a journalistic nature, and specifically excludes scientific journals from its remit. While Article 2 (4) and Recitals 55 and 56 of the DSM Copyright Directive inform the meaning of the term "press publication", there appears to be a need to consolidate the language in those provisions into a comprehensive definition in the implementing legislation. For example, the definition in Article 2(4) does not mention specifically news websites and videos on them.
3. The scope of the protection is clarified to allow that, while article 15 can apply to either entire articles or parts of articles, it has a quantitative criterion as its basis for protection. This means that it does not apply to individual words or very short extracts. The new right also does not apply to private or non-commercial uses of press publications by individual users. Recital 57iv notes that the rights granted to publishers of press publications do not extend to acts of hyperlinking. This recital also clarifies that the rights granted to press publishers do not extend to "mere facts" reported in press publications.
4. The new press publishers right have a two-year term of protection from the 1 January after the date of publication. It does not apply to publications published before 6 June 2019.
5. Remuneration generated by this new provision is to be shared between the authors of the works incorporated in the publication and the publishers themselves. This is without prejudice to existing law in Member States, which includes provisions in Irish law in the Copyright and Related Acts 2000 (as amended), specifically Section 23(1)(A)^v on the first ownership of copyright in the context of employment contracts.

Law Society Submission on Article 15

- 5.3 While **Article 2(4) and Recitals 55 and 56** of the DSM Copyright Directive inform the meaning of the term "press publication," there is still room for some interpretation as to those entitled to avail of this right and it is a policy question as to whether further explanation of those falling within these criteria might be included in the implementing legislation, particularly given the changes in the media and press over the last 20 years, and the emergence of different types of journalistic outlets and media.

- 5.4 **Article 15 (1):** Under Article 15 (1) private or non-commercial use, the use of individual words or “very short extracts” from press publications will continue to be permitted without restrictions. This will be an important element of Article 15 in practice. Either the implementing Irish legislation could use this phrase, or it could be defined in the legislative instrument. The Law Society’s preference is to avoid a lack of clarity in practice and so, on balance, recommend inclusion of objective and clear language in respect of this otherwise subjective phrase.
- 5.5 Providing for the maximum number of words or a maximum number of characters permitted would be two factors that might be relevant in addressing this question. Recognition should be given to the purpose of the extract (to allow a user determine whether they wish to access the content) and the context of the extract; publications can be in text, but also may include or comprise of videos, audio or images.
- 5.6 Given constant advancements in information society service provider searches in digital services, consideration should be given to what is caught by the concept of “hyperlinking” also and whether further clarification would be beneficial.
- 5.7 Section 23 of CRRRA provides that the author of a work is the first owner of the copyright unless the work is made by an employee in the course of employment, in which case the employer is the first owner of any copyright in the work, subject to any agreement to the contrary, which the Consultation Paper acknowledges. When implementing this article consideration should be given to the fact that the employee, and not the employer, is the author for the purposes of the Article 15(6) rights, which will have implications for intellectual property in the context of employment relationship. Whether or not this new right will be capable of assignment by the author, should be expressly dealt with in the implementing legislation.
- 5.8 It appears to the Law Society that the two rights, the new neighbouring press publishers’ right and the existing copyright in typographical arrangements of published editions, can coexist as separate legal rights in a similar way to neighbouring rights in sound recordings coexist with rights in musical compositions on those sound recordings.
- 5.9 In the DBEI Consultation Paper reference is made to the new press publishers’ right not applying to publications published before 6 June 2019, as per Article 15(5), and so consideration will need to be given as to how the new press publishers right can be exercised if it is to have retrospective effect to 6 June 2019 once the implementing legislation is enacted. Great care has to be taken in introducing legislation with both retrospective and economic impacts, where it is not possible for the actors to model their economic arrangements from the relevant date because of lack of knowledge as to how the relevant legislation would be implemented.
- 5.10 **Article 15 (6):** Article 15 provides for a right enabling an press publication to levy a fee from an Information society service provider that re-publishes excerpts from the original press publication, Authors will be entitled to an "appropriate" share of this

revenue. In the view of the Law Society the word “appropriate” used in this context is somewhat subjective and so the Law Society recommend the inclusion of clarificatory language as to what is “appropriate”. Some enquiry could be made into the experience of the two EU countries, Spain and Germany, that had such regimes in place before the DSM Copyright Directive.

- 5.11 In addition it is not clear how authors will enforce their entitlement to their share of the revenue, whether it is to be recovered from the press publication and not directly against the information society service provider; the transposing legislation should clarify this point.

6 **Article 16 – Claims to fair compensation**

6.1 DSM Copyright Directive - Article 16

Claims to fair compensation

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.

The first paragraph shall be without prejudice to existing and future arrangements in Member States concerning public lending rights.

6.2 Extract on Article 16 taken from the DBEI Consultation Paper:

Article 16 is an optional provision, which provides that where Member States have a system of compensation for the use of copyright-protected works under an exception or limitation to copyright, a transfer of license from an author to a publisher (e.g. press, books, scientific publications and music) would be a sufficient legal basis for the publisher to claim a share of any compensation arising from the use of the work under an exception or limitation. This provision is without prejudice to national arrangements regarding public lending rights.

This is a voluntary provision for Member States and is not intended to oblige Member States that do not currently have such compensation-sharing schemes to introduce them. Ireland does not currently have a compensation-sharing scheme relevant to this provision.

Law Society Submission on Article 16

- 6.3 Whether or not the Government decides to introduce a new private copy and reprography levy is a policy matter which the Law Society does not intend to comment upon. Any change in law would need to take account of the authors’ rights under the CRR and the CJEU decision in the Hewlett-Packard case.

6.4 If a policy decision is taken to introduce a compensation-sharing scheme under Article 16 then stakeholders will need to restructure relationships to adjust to the new business and economic model, including with regards to how the publishers establish a legal basis to claim a share of compensation for uses of the work carried out under a copyright exception.

7 **Article 17 – Use of Protected Content by Online Content-Sharing Service Providers**

7.1 DSM Copyright Directive - Article 17

Use of protected content by online content-sharing service providers

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

a. made best efforts to obtain an authorisation, and

b. made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject

matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

- c. acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).
5. In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account:
 - a. the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and
 - b. the availability of suitable and effective means and their cost for service providers.
 6. Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC (20), the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites.

Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

7. The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- a. quotation, criticism, review;
 - b. use for the purpose of caricature, parody or pastiche.
8. The application of this Article shall not lead to any general monitoring obligation.

Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

9. Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

Online content-sharing service providers shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

10. As of 6 June 2019 the Commission, in cooperation with the Member States, shall organise stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders. The Commission shall, in consultation with online content-sharing service providers, rightholders, users' organisations and other relevant stakeholders, and taking into account the results of the stakeholder dialogues, issue guidance on the application of this Article, in particular regarding the cooperation referred to in paragraph 4. When discussing best practices, special account shall be taken, among other things, of the need to balance fundamental rights and of the use of exceptions and limitations. For the purpose of the stakeholder dialogues, users' organisations shall have access to adequate information from online content-sharing service providers on the functioning of their practices with regard to paragraph 4.

7.2 Extract on Article 17 taken from the DBEI Consultation Paper:

Article 17 is intended to address the issue of the value gap in the digital market, where rightsholders, such as musicians, are receiving less remuneration relative to the increase in use of their works while balancing the rights of online content-sharing service providers to operation (“platforms”).

The definition of a platform is contained in article 2(6) with some guidance on that definition provided in recital 62. This article specifies that providers that fall under this definition are those where the main, or one of the main, purposes of the platform is to store and give access to large amounts of copyright-protected works or other protected subject matter uploaded by users, and where the platform organises and promotes for profit-making purposes. The second paragraph of recital 62 has an indicative list of the types of services which are intended to be excluded, such as not-for-profit online encyclopaedias and non-for-profit educational and scientific repositories.

A platform performs an act of communication to the public when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users (as outlined in article 17(1)). Where a platform is performing an act of communication to the public, it does not benefit from the limitation of liability in article 14(1) of the eCommerce Directive 2001^{vi} for the purposes of article 17 of this Directive, as outlined in article 17(3) and clarified in recital 65^{vii}.

The overall objective of article 17 is to foster the licensing of copyright-protected works by platforms to ensure that rightholders can obtain remuneration for the exploitation/use of their works. This could be accomplished by obliging online content sharing service providers, such as video-sharing platforms, to seek licensing agreements with rightsholders for the use of their works. These agreements need to cover the acts of users, including:

- when these users are not acting on a commercial basis or where their activity does not generate significant revenues; and
- within the limits of the licence granted to the service, not beyond those limits.

Where no licensing agreement is reached, article 17(4) outlines that the platform would be liable for any unauthorised acts of communication to the public, where infringing content is uploaded by its users, unless it can demonstrate that it:

1. Makes its best efforts to obtain authorisations for these uploads from the rightsholders;
2. Makes its best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific protected content for which rightholders have provided them with relevant and necessary information to identify those works; and

3. Acts expeditiously upon receiving notice from rightholders to disable access to or remove content and makes best efforts to avoid future uploads of that content.

Article 17(5) outlines the conditions applicable to allow for a proportional approach to be taken when determining whether a platform is following the obligations contained in article 17(4). Recitals 66-69 provide further detail on the intention of these articles. This includes considering such factors as the size of the audience that platform reaches and the availability of suitable and effective means to comply with these obligations. There is also a carve-out for micro and small enterprises based on two conditions:

1. Services to the public have been available for less than three years,
2. Audience figures are less than 5 million per month on average (this is calculated based on the previous years' figures).

Micro and small enterprises meeting conditions 1 and 2 who have not concluded a licence agreement have an obligation, when notified by the rightholder, to remove/disable access to the copyright protected work.

Micro and small enterprises which do not meet the second condition, i.e. that have audience figures higher than 5 million per month on average, and who have not concluded a licence agreement, have an obligation, when notified by the rightholder, to remove/disable access to the copyright protected work and to prevent further uploads of the work.

Article 17(8) clearly indicates that the application of this article shall not lead to any general monitoring obligation. However, there is a transparency obligation on platforms to provide rightholders with adequate information, on the request of those rightholders, on the functioning of their practises in relation to their efforts to obtain authorisations, to ensure the unavailability of those works where they have been provided with the necessary information, and to act expeditiously on receipt of notices from rightholders to remove unauthorised content.

In addition, other safeguards within this article include that it shall not affect legitimate uses (such as caricature, parody or pastiche, or quotation for criticism or review); that it shall not lead to the identification of individual users except in accordance with GDPR and the E-Privacy Directives; and that the cooperation envisaged between rightholders and platforms shall not result in the prevention of the availability of content which does not infringe copyright.

Article 17 introduces new mandatory exceptions for "quotation, criticism, review, caricature, parody, or pastiche", (Recital 66) and Article 17. While Ireland has recently introduced a similar exception for caricature, parody, or pastiche in its national legislation in the Copyright and Other Intellectual Property Law Provisions

Act 2019, Article 17 harmonises that exception for user generated content. This will ensure greater consistency of the application of this important “freedom-of-speech” exception throughout the entire European Union.

Platforms are obliged to put in place effective and expeditious complaints and redress mechanisms to address disputes over the removal of content that has been uploaded. This includes cases of unjustified disabling of access to or removal of user content. This mechanism is to be put in place by the platforms who must process complaints without undue delay. Rightholders requesting the removal of content must justify their reasons for their requests. Decisions on the disabling of access to or removing of content should be subject to human review. There is also a requirement for an out-of-court redress mechanism to be available to users.

Law Society submissions on Article 17

- 7.1 In implementation of this Article, account needs to be taken of the objective of the DSM Copyright Directive in Recital 3, which is to promote “a well-functioning and fair marketplace for copyright.”
- 7.2 **Article 17 (2):** Article 17.2 refers to obtaining an authorisation “for instance by concluding a licensing agreement”. One of the ways of achieving this is through Collective Management Organisations/Copyright Collection Societies (“CMOs”). CMOs, as part of their licensing arrangements with users, issue blanket licence agreements of all their repertoire and all the repertoires of their equivalent CMOs in all the territories of the world, effectively the worldwide repertoire of music, lyrics, sound recordings, performances and related content. These blanket licences are issued so that, for example, television and radio stations do not have to get permissions from different copyright owners every time they play a musical composition or a sound recording. Instead they have a licence to communicate to the public/make available the worldwide repertoire to their audiences. They send logs of the works used and payments to the relevant CMO and the CMOs then distribute the revenue on a worldwide basis to the rightsholders. Blanket licences are now issued on a pan European basis to licensed music streaming services. This could form one model for licensing agreements with user generated content services while preserving the notice and takedown arrangements where the relevant copyright work is used in an unlicensed/wrongful manner.
- 7.3 However the Law Society do recommend respecting, and not inhibiting, the freedom to contract of each party, which the various stakeholders have currently. There should be options and some flexibility available to those seeking to structure their contractual relationships in this rights-rich environment, which still respecting the requirements of the Directive that impact on contracts (e.g. Article 20).
- 7.4 **Article 17(4)** Consideration also needs to be given to rightsholders who require that any use of their works takes place only with their consent, and who do not license their works through CMOs. These rightsholders will be relying on the operation of

Article 17(4) and these provisions, when implemented, need to be as clear and well defined as possible so that the positions of both the rightsholders and the platforms is clearly understood particularly what is meant by "best efforts". While the concept of "best efforts" is referred to in the Directive, what it means in practice needs further consideration. There is caselaw in Ireland and the United Kingdom for what constitutes "best endeavours" and further consideration could be given to the detailed elucidation of what is expected of those who have contracted to use "best endeavours" in that persuasive caselaw. Consideration should also be given as to what "efforts" must be made if an exclusive licence of a copyright work has already been granted.

- 7.5 When advising clients, advisors should be able to ascertain clearly what information is required to trigger Article 17(4)(b) in any particular scenario. This does not mean necessarily that the legislation needs to prescribe technological functionality in this regard. Any system contemplated by the legislation will also need to take account that some types of content are simply not suitable for the systems envisioned by Article 17(4)(b), as noted in Recital 66 of the Directive, which provides that "in some cases availability of unauthorized content can only be avoided upon notification of rightsholders." It would assist those endeavouring to comply with the legislation to have these cases explained or illustrated.
- 7.6 **Article 17(7)** Article 17(7) provides that cooperation between online platforms and rightholders must "not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation". Recital 70 notes that this cooperation "...should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users".
- 7.7 It is not entirely clear how an entity wishing to rely on an exception or limitation will be able to so rely with some certainty, nor how the platforms will uphold the right to rely on an exception or limitation in practice; it would be preferable to clarify this.
- 7.8 The Consultation Paper notes that Article 17 introduces a new mandatory exception for parody, pastiche and caricature, and that an exception for "caricature, parody or pastiche" was also introduced into the CRRA through the Copyright and Other Intellectual Property Law Provisions Act 2019. Care should be taken, when introducing the exception for user generated content, that it is done in a manner which ensures that it is consistent with the exception as expressed in the CRRA.
- 7.9 **Article 17(8)** The Directive expressly states in Recital 66 and Article 17(8) that Article 17 is not intended to provide for a general monitoring obligation. The implementing legislation should clarify how such a requirement may be reconciled with the overall provisions of Article 17, including but not limited to Article 17(4).

- 7.10 **Article 17(9).** There is some scope to flesh out what the principal elements of a complaint and redress mechanism to be introduced by this Article must be, including the funding of it. There is a suggestion in the DBEI Consultation that the mechanism under the Arbitration Act 2010 may be used as an "out-of-court redress mechanism" as required under Article 17(9). Given the wording of Article 17(9) the Law Society do not consider the Arbitration Act 2010 mechanism to be appropriate for this purpose.
- 7.11 **Article 17 (10).** The requirement for the EU Commission to cooperate with Member States, to 'organise stakeholder dialogues to discuss best practices' as to how Article 17 will operate in practice is important and due regard should be given by the DBEI to the comments of stakeholders and guidance from the Commission, particularly given the general language in the Directive Article itself. These dialogues will consider the introduction of effective filtering technology infringing content in order to avoid liability under the DSM Copyright Directive or whether there is an alternative option. Once the stakeholder dialogues are complete, the EU Commission will then issue guidance, based on the outcome of these best practice discussions. Whatever option is implemented the Government will need to be satisfied that the outputs of the system will satisfy the legal tests in Article 17 and take due account of the findings. The Law Society recommend that Ireland be active in its engagement with the EU Commission, in particular regarding the cooperation referred to in Article 17(4). This guidance will be useful to Member States, including Ireland, in facilitating and regulating that cooperation between relevant stakeholders at national level and in establishing what is best practice.
- 7.12 The Law Society recommend that Ireland wait until the outputs of these consultations have been issued before publishing draft legislation in respect of Article 17. The legal status of these stakeholder dialogue and guidelines that will issue as a result of the Article 17(10) process is unclear to us, however it is a sensible course of action that, in this complex sector, due account is taken of existing arrangements that function well in terms of the introduction of these new arrangements. The first of these stakeholder consultations took place on 15 October 2019, and another meeting is planned for 5 November. The objective of the first meeting was "to start mapping out existing practices related to the use of copyright-protected content by [online platforms], as well as to gather user experiences".

8 **Conclusion**

- 8.1 The Law Society hopes that the above commentary and recommendations assist the Department in what is an important Directive to the Irish economy, and its standing in such an international sector. As noted throughout this submission, the development of an Irish regime that brings legal certainty to consumers, businesses and practitioners alike, can form the part of a significant competitive advantage to the State, as well adding to its cultural and social capital.

- 8.2 The Law Society is available to meet with Department officials to outline in greater detail our position, and indeed to consider any additional issues the Department would welcome a view on, particularly as draft legislation is being considered.

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ⁱ E.I.P.R. 2019, 41(7), 404-414

ⁱⁱ Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works; (b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

ⁱⁱⁱ Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

^{iv} The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as online uses by information society service providers are concerned. The rights granted to publishers of press publications should not extend to acts of hyperlinking. They should also not extend to mere facts reported in press publications. The rights granted to publishers of press publications under this Directive should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC, including the exception in the case of quotations for purposes such as criticism or review provided for in Article 5(3)(d) of that Directive.

^v The author of a work shall be the first owner of the copyright unless—

(a) the work is made by an employee in the course of employment, in which case the employer is the first owner of any copyright in the work, subject to any agreement to the contrary.

^{vi} Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. 2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider. 3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

^{vii} 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. That should not affect the application of Article 14(1) of Directive 2000/31/EC to such service providers for purposes falling outside the scope of this Directive.