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## The knottiest of Gordian knots: Article 17 of the Copyright Directive

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## Final Draft

Title:

### **The knottiest of Gordian knots: Article 17 of the Copyright Directive**

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#### **Abstract**

This article analyses the much debated Article 17 of the EU Copyright Directive (Directive 2019/790) in the light of last year's comprehensive European Commission guidance. The aim of the guidance is to support a correct and coherent transposition of Article 17 across the EU27. Following the recent landmark judgment in *Case C-401/19, Poland v European Parliament and Council of the EU*, some commentators have now suggested that it might be timely for the European Commission to issue further guidance on Article 17.

#### **Introduction**

Article 17 of Directive 2019/790<sup>3</sup> (the Directive) is a complex provision within a complex piece of legislation. While the provision's principal objective is to create a liability regime governing online service providers, such as YouTube, Facebook and TikTok, Article 17 adopts a nuanced approach and contains important exemptions from liability for online service providers provided they comply with three *cumulative* conditions. Unfortunately, considerable challenges are likely to arise in the interpretation and application of the three conditions. This is due to rather poor drafting by the EU legislature, to include open-ended words or phrases in the exemption framework, i.e. Article 17 (4) of the Directive. It is likely that these legislative vulnerabilities will be exposed in Article 17-related litigation both in the domestic and CJEU arenas in the future.

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<sup>3</sup> 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 and amending Directives 96/9/EC and 2001/29/EC. OJ L130/92 (17<sup>th</sup> May, 2019).

On the basis of Article 17 (10) of the Directive, and, following a series of six stakeholder dialogues,<sup>4</sup> the European Commission issued its non-legally binding guidance on Article 17 on 4<sup>th</sup> June, 2021. This guidance is provided by way of a European Commission Communication to the European Parliament and Council, dated 4<sup>th</sup> June, 2021 (the Guidance).<sup>5</sup> The publication of the Guidance was very much at the eleventh hour, with national legislatures only getting three days to read and digest the contents of the 26-page Guidance before the arrival of the transposition deadline on 7<sup>th</sup> June. This very late publication by the European Commission explains, in large part, the failure by a significant number of Member States to transpose the Directive on time. In fact, only four EU Member States succeeded in transposing the Directive by the transposition deadline, namely, the Netherlands, Germany, Hungary and Malta. Indeed, as of 19<sup>th</sup> May, 2022, there were still thirteen Member States yet to transpose the Directive into local law.<sup>6</sup>

The aim of the Guidance is to support a correct and coherent transposition of Article 17 across the Member States. It does this by paying particular attention to the need to balance fundamental rights and the use of copyright exceptions and limitations, as required by Article 17 (10) of the Directive. The Guidance also states that it could be of assistance to market players when complying with national legislation implementing Article 17. It is worth noting that the Guidance itself acknowledges that it may need to be reviewed following the CJEU judgment in *C-401/19, Republic of Poland v European Parliament and Council of the EU* (i.e. the Polish challenge to Article 17).<sup>7</sup> As this landmark judgment was handed down on the 26<sup>th</sup> April, 2022, some commentators have now started to ask whether new European Commission guidance will be published, possibly dealing with the legislative safeguards contained in Article 17 which protect the right to freedom of expression and information of internet users.<sup>8</sup> These legislative safeguards were underscored by the CJEU in its April judgment.<sup>9</sup>

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<sup>4</sup> Which took place between October 2019 and February 2020.

<sup>5</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), dated 4<sup>th</sup> June, 2021.

<sup>6</sup> See European Commission press release dated 19 May, 2022 “Copyright: Commission urges Member States to fully transpose EU copyright rules into national law”. The non-compliant Member States are: Belgium, Bulgaria, Cyprus, Denmark, Greece, France, Latvia, Poland, Portugal, Slovenia, Slovakia, Finland and Sweden.

<sup>7</sup> European Commission Guidance, at p. 1.

<sup>8</sup> Christophe Geiger and Bernd Justin Jütte, “Constitutional Safeguards in the “Freedom of Expression Triangle” – Online Content Moderation and User Rights after the CJEU’s Judgment on Article 17 Copyright DSM Directive” (Kluwer Copyright Blog) <http://copyrightblog.kluweriplaw.com/2022/06/06/constitutional-safeguards-in-the-freedom-of-expression-triangle-online-content-moderation-and-user-rights-after-the-cjeu-judgement-on-article-17-copyright-dsm-directive/> (accessed: 15<sup>th</sup> June, 2022)

<sup>9</sup> See paragraphs 84 – 98 (inclusive) of *Case C-401/19, Republic of Poland v European Parliament and Council of the EU*. Another compelling reason for possible new European Commission guidance is the statement in

## Lex Specialis

Article 17 is a *lex specialis* to Article 3 of the Information Society Directive (Directive 2001/29/EC) and Article 14 of E-Commerce Directive (Directive 2000/31/EC).<sup>10</sup> As a *lex specialis*, Article 17 takes priority over Articles 3 and 14, in conformity with the latin legal maxim *lex specialis derogat legi generali* (a law governing a specific subject matter overrides a law that only governs general matters. This principle is also a generally recognised rule of legal interpretation).

The Guidance is clear in that it states that Article 17 does not introduce a new right in the Union’s copyright law. Rather, it fully and specifically regulates the act of communication to the public in the limited circumstances covered by Article 17, for the purposes of the Directive.<sup>11</sup>

Due to the *lex specialis* nature of Article 17, the European Commission’s guidance is that member states “should specifically implement this provision rather than relying simply on their national implementations of Article 3 of Information Society Directive”.<sup>12</sup>

## Ambiguous expressions

One of the principal challenges with Articles 2 and 17 of the Directive (the former being the definitions provision) lies with the use of quite ambiguous expressions that undermine legal certainty.

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paragraph 99 of Case C-401/19, Republic of Poland v European Parliament and Council of the EU to the effect that “Member States, **must**, when transposing Article 17 into their national laws take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter”. At the same paragraph of the judgment, the CJEU requires the authorities and courts of the Member States “when implementing the measures transposing Article 17” to not only interpret their national law in a manner consistent with Article 17 but also to make sure that they do not act on the basis of an interpretation of Article 17 which would be in conflict with the fundamental rights or with general principles of EU Law such as the principle of proportionality, specific reference being made to *Case C-275/06 Promusicae v Telefónica de España SAU*, EU:C:2008;54 (paragraph 68).

<sup>10</sup> The *lex specialis* nature of Article 3 is also confirmed by the European Commission’s (2020) Action Plan on Intellectual Property. At p. 8 of the aforementioned Action Plan, Article 17 is described as setting out “a **specific legal regime** for the use of copyright-protected content by user-uploaded content sharing platforms”. Communication from the Commission (dated 25<sup>th</sup> November 2020) (COM (2020)) “Making the most of the EU’s innovative potential – An Intellectual Property Action Plan to support the EU’s recovery and resilience”

<sup>11</sup> European Commission Guidance, at page 2.

<sup>12</sup> European Commission Guidance, at page 2.

For example, as regards Article 2 (6), one of the conditions for being an “online content-sharing service provider” for the purposes of the Directive is the granting the public access to “a large amount of copyright-protected works”. The Guidance notes that the Directive does not provide for any quantification of this concept and it advises the EU Member States to “refrain from quantifying ‘large amount’ in their national law” in order to avoid legal fragmentation through a potentially different scope of service providers covered in different Member States.<sup>13</sup>

The exemption from liability regime under Article 17 (4) is not without its own challenges. For a service provider to avoid liability for unauthorised acts of communication to the public (including making available to the public), it must fulfil three *cumulative* conditions. Each of the conditions contains a best efforts obligation. But, the notion of “best efforts” is not defined anywhere in the Directive. Nor is there any reference to national law. The Guidance refers to the notion of “best efforts” as “an autonomous notion of EU Law” and further advises that it should be transposed by the Member States in accordance with the Guidance and interpreted in the light of the aim and the objectives of Article 17 and the text of the entire article.<sup>14</sup>

In its Guidance,<sup>15</sup> the European Commission recommends that the actions carried out by the service provider to seek out, and /or engage with rightholders needs to be assessed on a case-by-case basis to determine whether they constitute best efforts to obtain an authorisation.

In its Guidance,<sup>16</sup> the European Commission distinguishes between rightholders who “can be easily identified and located” and those “who are not easily identifiable by any reasonable standard”. Referring to the principle of proportionality, in the context of the latter category of rightholders, the Commission recommends that service providers should not be expected to proactively seek out rightholders belonging to that group. As a possible panacea, however, the Commission encourages the Member States to develop registries of rightholders that could be consulted by service providers, in compliance with data protection rules, when applicable.

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<sup>13</sup> European Commission Guidance, at page 5.

<sup>14</sup> European Commission Guidance, at page 8.

<sup>15</sup> At page 9

<sup>16</sup> At page 9

As regards efforts made by service providers (to obtain the necessary authorisations) the Commission unhelpfully focuses on the size and audience of the service and the different types of content being made available. It distinguishes between large service providers with a big audience in several or all Member States and “smaller service providers with limited or national audiences”. In the Commission’s view, the large service providers may be expected to reach out to a high number of rightholders to obtain authorisations while smaller service providers may be expected to contact proactively only relevant collective management organisations (CMOs) and “possibly a few other easily identifiable rightholders”.

### The notion of Best Efforts

Recital (61) of the Directive states when licensing agreements are negotiated, they should be fair and keep a reasonable balance between both parties. The recital goes on to state that rightholders should receive appropriate remuneration for the use of their protected work or other subject matter. The Guidance recommends therefore that the notion of best efforts should cover the efforts deployed by service providers, in cooperation with rightholders, to conduct negotiations in good faith and conclude fair licensing agreements. The Guidance further recommends that service providers be transparent with rightholders concerning the criteria they intend to use to identify and remunerate the content covered by the agreement, particularly when they use content recognition technology to report on the uses of content under licences.

According to the Guidance, service providers which refuse to conclude a licence offered on fair terms and maintaining a reasonable balance between the parties may be considered not to have deployed their best efforts to obtain an authorisation.<sup>17</sup> The question of what constitutes fair terms and a reasonable balance between the parties will be determined on a case by case basis.<sup>18</sup>

### Best efforts in accordance with high industry standards of professional diligence

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<sup>17</sup> European Commission Guidance, at page 10.

<sup>18</sup> European Commission Guidance, at page 10.

The second condition set out in Article 17 (4) is that in the absence of an authorisation, online service providers should be liable for acts of communication to the public including making available to the public concerning copyright-protected uploaded to their platforms, unless they demonstrate that they have made their best efforts. This should be in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and other subject matter for which the rightholder provided them with the relevant and necessary information. Once again, the term “high industry standards of professional diligence” is very open-ended and is not exactly a paragon of clarity.

Recital (66) of the Directive assists somewhat. It states that to assess whether a given service provider has made its best efforts, “account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works... taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the principle of proportionality”.

The Guidance also highlights the importance and relevance of looking at “the available industry practices on the market at any given point in time” including the use of “technology or particular technological solutions”. Recital (66) states that “any steps taken by the service providers should be effective with regard to the objectives pursued” but the Guidance nuances this somewhat by stating that online service providers should remain free to choose the technology or the solution to comply with the best efforts obligation in their specific situation”.<sup>19</sup>

The Guidance recommends that Article 17 (4) (b) be implemented in “a technologically neutral and future proof manner”. It further recommends that the Member States should not in their implementing laws mandate either the use of a technological solution nor impose any specific technological solutions on service providers in order to demonstrate best efforts.<sup>20</sup> Instead, it recommends a flexible approach based on “mutually convenient cooperation arrangements between rightholders and service providers”.<sup>21</sup>

Referencing “current market practices”, the Guidance acknowledges the importance and prominence of content recognition technology in the

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<sup>19</sup> European Commission Guidance, at p. 12

<sup>20</sup> European Commission Guidance at p. 11.

<sup>21</sup> European Commission Guidance at p. 12.

management of the use of copyright-protected content. This is particularly the case for the major online service providers who frequently use fingerprinting technology in the context of video and audio content. However, the Guidance cautions that this particular technology should not necessarily be considered the market standard, and particularly so for smaller online service providers.<sup>22</sup>

Besides fingerprinting, the Guidance highlights other technologies which can detect unauthorised content (and which were referred to in the stakeholder dialogues). These include hashing, watermarking, the use of metadata, keyword search or a combination of different technologies. These technological tools may be developed in-house or bought in from third parties. The Guidance acknowledges the expectation that service providers may rely on a number of different technological tools in order to comply with their obligation under Article 17 (4) (b).<sup>23</sup>

According to the Guidance, the assessment of whether a service provider has made its “best efforts” under Article 17 (4) (b) should be made on a case-by-case basis, according to the principle of proportionality, as set out in Article 17 (5) of the Directive.<sup>24</sup> This means, in practice, that service providers should not be expected to apply the most costly or sophisticated solutions if this would be disproportionate in their specific case. This limited and pragmatic expectation of service providers even seems to cover situations where rightholders earmark certain content as being content whose availability could cause significant harm to them.<sup>25</sup> Additionally, there may be cases where technology is not readily available for certain types of content or, is not developed at a given point in time.

When transposing Article 17 (4) (b), Member States should, according to the Guidance, consider the following elements:<sup>26</sup>

- i. **The type, size and audience of the service:** larger service providers with a significant audience may be expected to deploy more advanced solutions/technologies than smaller service providers, with limited audiences and resources. The Guidance suggests that it may be more

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<sup>22</sup> European Commission Guidance, at p. 12

<sup>23</sup> European Commission Guidance, at p. 13.

<sup>24</sup> European Commission Guidance, at p. 13

<sup>25</sup> European Commission Guidance, at p. 13

<sup>26</sup> European Commission Guidance, at p. 13 & 14

proportionate to expect smaller service providers to resort to simpler solutions like metadata or key word search.

- ii. **The availability of suitable and effective means and the related costs.** The cumulative cost of different solutions may need to be borne by a service provider, for example, different solutions may be needed for different types of content, e.g. content recognition technologies for music may not be the same as for still images and may be developed by various technology providers. Where rightholders have developed different protection solutions (e.g. different watermarking solutions) this may have a negative consequence for service providers in that they may be forced to use different software.
- iii. **The type of content uploaded by users:** Where a service provider makes available different types of content, the actions to be undertaken may vary depending on whether the content is prevalent (or less common) on the website. Normally, the service provider would be expected to deploy more complex solutions for content that is prevalent on its platforms.

The requirement of best efforts is dependent on the rightholder having provided the service provider with the “relevant and necessary information”. Recital (66) of the Directive specifies that if no such information meeting the requirements of Article 17 (4) is provided by rightholders, then service providers are not liable for unauthorised uploads. Where the information is absent, service providers cannot act.<sup>27</sup> Therefore, to ensure the effectiveness of Article 17 (4) (b), cooperation between service providers and rightholders is essential.

## Relevant and necessary information

As regards the actual concept of “relevant and necessary information”, the Guidance recommends that it be transposed by Member States “in accordance with this guidance and the objectives of Article 17”. When it comes to whether information actually constitutes “relevant and necessary information”, the Guidance recommends that the assessment be carried out on a case-by-case basis. To avoid any ambiguity in terms of which party needs to be proactive, the

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<sup>27</sup> European Commission Guidance, at p. 11

Guidance states that the “relevant and necessary information should be provided upfront”.<sup>28</sup>

The Guidance on relevant information is not entirely clear. It states that relevant information “will vary depending on the works concerned and the circumstances that pertain to the specific works or other subject matter”.<sup>29</sup> The Guidance does state however that the information should, as a minimum, be accurate about the rights ownership of the particular work.

Under the Guidance, what constitutes “necessary” information will also vary depending on the solutions deployed by service providers. The effective application of technological solutions by service providers seems to be the overarching objective, meaning that rightholders need to meet the service provider half-way. An example of this (cooperative) approach is given in the Guidance - where finger printing is used by the service provider, then the rightholder may be asked to provide a fingerprint of the specific work/subject matter to the service provider, along with ownership of the right.<sup>30</sup>

Highlighting the key theme of cooperation between service providers and rightholders and the need for rightholders and service providers to cooperate on the best way to approach identification of works, the Guidance states that “necessary and relevant information” implies information that rightholders can *realistically* provide.<sup>31</sup>

The Guidance also adverts to a situation where a rightholder chooses to identify specific copyright-protected content, the unauthorised online availability of which could cause *significant economic harm* to them. This prior earmarking of particularly valuable content could be a factor to be taken into account when assessing whether service providers have made their best efforts to ensure the unavailability of the specific content.<sup>32</sup>

## Notice & Take Down – Notice & Stay Down – Article 17 (4) (c)

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<sup>28</sup> European Commission Guidance, at p. 11

<sup>29</sup> European Commission Guidance, at p. 14

<sup>30</sup> European Commission Guidance, at p. 14.

<sup>31</sup> European Commission Guidance, at p. 14

<sup>32</sup> European Commission Guidance, at p. 14

The third condition within the exemption framework (set out in Article 17 (4) (c)) requires that the service provider demonstrates that they have “acted expeditiously” upon receiving a “sufficiently substantiated notice” from the rightholder to disable access to or, remove from their websites, the notified works, and that they have made best efforts to prevent their future upload in accordance with Article 17 (4) (b).

This notice and take-down and notice and stay down system applies when content that is not authorised has become available on the service provider’s website.

The Guidance paints three scenarios where unauthorised content may become available and requires action under Article 17 (4) (c)<sup>33</sup>:

- i. Rightholders have not provided the service providers *in advance* with the “relevant and necessary information” (to avoid the availability of unauthorised content). They act *ex post*, once a given content has become available, to ask for its removal and stay down, based on the necessary and relevant information provided by them
- ii. Service providers have made their best efforts to avoid unauthorised content under Article 17 (4) (b) but, despite these efforts, unauthorised content becomes available for objective reasons when some content cannot be recognised due to the inherent limitations of technologies; or,
- iii. In some specific cases, service providers may be expected to act only after a notice has been submitted by rightholders, as explained in recital (66) of the Directive.

According to the Guidance,<sup>34</sup> the “best efforts” that service providers should make to prevent future uploads of notified works should be approached in the same way as in relation to Article 17 (4) (b), as explained in sub-section 2 of the Guidance. The assessment of whether best efforts have been made by service providers has to be carried out on a case-by-case basis and taking into account the principle of proportionality provided for in Article 17 (5).

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<sup>33</sup> European Commission Guidance, at p. 15

<sup>34</sup> European Commission Guidance, at p. 15

This part of the Guidance reminds Member States that the application of Article 17 should not lead to any general monitoring obligation for the service providers. Furthermore, legitimate uses of protected works have to be safeguarded as provided for under Article 17 (7) and (9). In other words, internet users throughout the EU will be able to rely on the following important copyright exceptions and limitations when uploading/making available UGC on online content-sharing services: quotation, criticism, review, caricature, parody or pastiche.

### Drawing a distinction between the service provider's takedown obligations and its stay-down obligations under Article 17 (4) (c)

At page 15, the Guidance recommends that Member States clearly differentiate the type of information rightholders provide in their “sufficiently substantiated notice” in each scenario.

As regards the information to be provided by the rightholder in the takedown scenario, the European Commission recommends that Member States follow the Commission Recommendation on Measures to Effectively Tackle Illegal Content Online.<sup>35</sup> (Commission Recommendation)

Points 6-8 of the Commission Recommendation list elements that could be included in the rightholders' notices. The notices should be sufficiently precise and adequately substantiated to enable the service providers to take an informed and diligent decision in respect of the content to which the notice relates. In particular, the notice should contain an explanation of the reasons why the notice provider considers that content to be illegal content and a clear indication of the location of the content.

As regards the so-called “stay down” obligation (contained in Article 17 (4) (c) (second limb)), this provision requires service providers to make best efforts to avoid future uploads of the works notified by the rightholders. In referring back to paragraph (b), it implies that rightholders must provide the service providers with the same “relevant and necessary information” to allow them to deploy

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<sup>35</sup> Commission Recommendation (EU) 2018/334 of 1 March 2018 on Measures to Effectively Tackle Illegal Content Online, OJ L63/50 (6<sup>th</sup> March 2018). The (English version) of the Recommendation can be accessed at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018H0334&from=EN> (accessed on 7<sup>th</sup> July, 2022)

their best efforts to avoid future uploading of infringing works. The Guidance provides a helpful example – if a service provider uses fingerprinting technologies to avoid future uploads of notified works, then the expectation would be that rightholders would need to provide the service provider with fingerprints or content files to assist it block future uploads of illegal works.<sup>36</sup>

Article 17 (5) specifies two other elements (among others) that need to be taken into account in determining whether a service provider has complied with its obligations under Article 17 (4). These elements factor in the principle of proportionality and are:

- a) The type, the audience and the size of the service offered by the service provider and the types 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

### Specific liability regime for new service providers

17 (6) provides for a specific liability regime with different conditions for new service providers whose services have been available to the public in the EU for less than 3 years and who have an annual turnover of less than 10 million euros. Recital (67) of the Directive makes it clear that this lighter liability regime is specifically aimed at “start-up companies working with user uploads to develop new business models”. Recital (67) makes reference to “genuinely new businesses” and states that the lighter liability regime should not apply to newly created services or services provided under a new name but which pursues the activity of an already existing online service provider (which could not benefit or no longer benefit from the lighter liability regime).

In essence, Article 17 (6) provides for a two-tier system with different rules applying to the ‘new’ service providers, depending on whether or not the service provider attracts an average monthly audience of more than 5 million plus visitors (calculated on the basis of the previous calendar year). If it does, then its obligations are heavier and it must comply with the obligation to avoid future uploads of notified works under Article 17 (4) (c) (second part) (stay down

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<sup>36</sup> European Commission Guidance, at p. 16.

obligation). The principle of proportionality (set out in Article 17 (5)) is also relevant to the lighter liability regime under Article 17 (6). This means that the best efforts that can be expected from the new service providers to obtain an authorisation may differ depending on their specific situation.

## Works covered by copyright exceptions and limitations – Article 17 (7) of the Directive

Article 17 (7) protects legitimate use covered by the exceptions or limitations set out in the provision. This provision *obliges* Member States to implement the exceptions or limitations into their local law. The six exceptions/limitations mentioned in Article 17 (7) are quotation, criticism, review, caricature, parody and pastiche.

The Guidance refers to these particular exceptions/limitations as “mandatory for the Member States to implement”. Naturally, these exceptions/limitations can be relied on by individuals when uploading content and making it available online. Recital (70) of the Directive highlights the importance of the exceptions/limitations in the context of fundamental rights. The freedom of expression of individual users must be guaranteed but Recital (70) also underscores how the exceptions/limitations enable a balance to be struck with the fundamental rights laid down in the Charter of Fundamental Rights of the EU. The relevant rights in this context are: freedom of expression,<sup>37</sup> freedom of the arts,<sup>38</sup> freedom to conduct a business<sup>39</sup> and the right to property (to include intellectual property)<sup>40</sup>.

The Guidance examines the important issue of ensuring that copyright compliant works (and works covered by an exception/limitation) are not blocked

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<sup>37</sup> Protected by Article 11 of the EU Charter, which actually relates to freedom of expression and information. This right covers the right to “receive and impart information and ideas without interference by public authority and regardless of frontiers”.

<sup>38</sup> Article 13 of the EU Charter enshrines freedom of the arts and science. It states that “the arts and scientific research shall be free of constraint”.

<sup>39</sup> Article 16 of the EU Charter enshrines the freedom to conduct a business in accordance with EU Law and national laws and practices.

<sup>40</sup> Article 17 of the EU Charter creates a “right to property”, while Article 17 (2) protects intellectual property as a component of property.

by service providers.<sup>41</sup> This obligation imposed on service providers by Article 17 (7) is an “obligation of result”. This significant issue shines a light on cooperation between rightholders and service providers and must be viewed in the context of the best efforts obligations imposed on service providers under Article 17 (4) (b) and (c).

The Guidance examines this obligation in the context of automated content recognition technology, deployed by service providers to fulfil their obligations under Article 17 (4). Significantly, the Directive draws a distinction between “manifestly infringing uploads” and non-manifestly infringing uploads. Of importance too is the fact that the Guidance concedes that “in the present state of the art, no technology can assess to the standard required in law whether content, which a user wishes to upload, is infringing or a legitimate use”.<sup>42</sup> Conversely, however, content recognition technology may identify specific copyright-protected content for which rightholders have provided relevant and necessary information to service providers.

The Guidance recommends that where an upload matches a specific file provided by a rightholder, then, automatic blocking of that uploaded content should occur.<sup>43</sup> The Guidance recommends that this approach be “limited to manifestly infringing uploads”. In contrast, the Guidance recommends that uploads that are not “manifestly infringing” should, in principle, be permitted to go online and may be subject to an *ex post* human review where a rightholder opposes by sending a notice to the service provider.

Once again referencing the “existing limitations of technology”, the Guidance endorses the approach whereby service providers should determine at the point of upload whether content is manifestly infringing or not.<sup>44</sup> This, the Commission asserts, is a “reasonable, practical standard” to determine whether an upload should be blocked or go online and to ensure the respect for Article 17 (7). Somewhat confusingly, or perhaps pragmatically, the Guidance states that the identification of manifestly infringing content by automated means does not represent a legal assessment of the legitimacy of the upload, including whether it is covered by an exception.<sup>45</sup> This seems to imply that such an automated blocking still requires an *ex-post* human review (by a lawyer) to determine

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<sup>41</sup> European Commission Guidance, at pp 20-24.

<sup>42</sup> European Commission Guidance, at p. 20

<sup>43</sup> European Commission Guidance, at p. 20.

<sup>44</sup> European Commission Guidance, at p. 20.

<sup>45</sup> European Commission Guidance, at p. 21

whether in fact the uploaded content is copyright compliant or not! This also means that the automated block is but the first phase in the filtering process and it needs to be complemented by a (second phase) human examination.

At page 21, the Guidance refers to “current market practices of cooperation between rightholders and service providers”. This cooperation translates into information and instructions being provided by rightholders to service providers. But, where a rightholder has not given a blocking instruction to a service provider in relation to certain content, then, that content should not be considered manifestly infringing according to the Guidance.<sup>46</sup> The Guidance helpfully suggests relevant criteria to detect a manifestly infringing upload in practice.<sup>47</sup> These criteria include the following:

- The length/size of the identified content used in the upload
- The proportion of the matching/identified content in relation to the entire upload
- The level of modification of the work, e.g. whether the upload matches only *in part* the identified content because it has been modified by the user

The Guidance suggests that these criteria could be applied taking into account the type of content, the business model, as well as the risk of significant economic harm to rightholders. Unhelpfully, the Guidance does not attempt to define or elaborate on the term “significant economic harm” but it does provide an example of a situation that could cause “significant harm” to rightholders (note the use of “significant harm” as opposed to “significant economic harm”). Such a situation might involve a very large number of very short extracts uploaded on a service. When taken together in the aggregate, these extracts could cause significant harm to a service whose business model revolves around the large scale use of short content, for example, excerpts of music of very short duration.<sup>48</sup>

Other examples of manifestly infringing uploads provided by the Guidance include exact matches of entire works or of significant proportions of a work.<sup>49</sup> A practical example of same would be when the recording of a whole song is used as background in a user-created video. Another practical example would

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<sup>46</sup> European Commission Guidance, at p. 21.

<sup>47</sup> European Commission Guidance, at p. 21

<sup>48</sup> European Commission Guidance, at p. 21

<sup>49</sup> European Commission Guidance, at p. 21

be the upload of an original work which has simply been technically altered/distorted to avoid its identification (like in the case of adding an outside frame to the picture or flipping it by 180 degrees).<sup>50</sup>

To provide balance, the Guidance also provides examples of uploads that would not be considered manifestly infringing.<sup>51</sup> For example, an upload which only partially matches the information provided by the rightholder. This situation may arise where a user has significantly modified a work in a creative manner to create, for example, a meme – this adapted work may in fact be covered by the parody exception. Another example of uploads not generally considered manifestly infringing include short extracts representing a small proportion of the entire work identified by the rightholder (such use may be covered by the quotation exception). This could be the case of a user-generated video including an extract of a feature film or an extract of a song.

#### Enhanced care and diligence on the part of the service providers – Rapid *ex ante* human reviews

The Guidance recommends that service providers should exercise “particular care and discipline” in the application of best efforts obligations before uploading content which could cause significant economic harm to rightholders.<sup>52</sup> According to the Guidance, this enhanced care and diligence may include “when proportionate and where possible/practicable” a rapid *ex ante* human review by the service provider of the uploads containing such earmarked content identified by an automated content recognition tool. The Guidance provides an example of a situation where a rapid *ex ante* human review might be used: for content which is particularly time sensitive e.g. pre-released music or films or highlights of recent broadcasts of sports events.<sup>53</sup>

The Guidance is alive to the possible risks associated with the use of a rapid *ex ante* human review and it recommends that service providers which deploy such a human review should include “mechanisms to mitigate the risks of misuse”. Where such a human review results in the service provider blocking the content, the Guidance recommends that users should be able to contest the blocking

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<sup>50</sup> European Commission Guidance, at p. 21

<sup>51</sup> European Commission Guidance, at pp 21 & 22

<sup>52</sup> European Commission Guidance, at p. 22

<sup>53</sup> European Commission Guidance, at p. 22

using the redress mechanism. Similarly, where a manifestly infringing upload is identified and blocked, users should be notified of this without delay and should be able to contest the blocking according to the Guidance.<sup>54</sup> In contesting the block, the user must give reasons for their request under the redress mechanism provided for in Article 17 (9).

Where a rightholder objects to an upload, the service provider should carry out a swift *ex post* human review for a rapid decision on whether the content should remain online or be removed. Rightholders should object by filing a notice. Information provided by a rightholder *ex ante* should be taken into account when assessing whether the notice is sufficiently substantiated.

The Guidance recommends that the *ex post* human review should allow the service provider to take a decision based on the arguments provided by both the rightholder and the user.<sup>55</sup> The content should remain online during the human review.

If, as a result of the *ex post* human review, and based on the arguments provided by both the rightholder and the user, the service provider ultimately decides to disable/remove the uploaded content, then it should inform the user and the relevant rightholders as soon as possible of the outcome of the review. The user should then be able to have recourse to the out-of-court dispute resolution mechanism provided by Article 17 (9) of the Directive.

If the service provider decides to leave the content online, then it is still open to the rightholder to send a further notice to the service provider at a later date should new elements or circumstances arise which may justify a new assessment.<sup>56</sup> The Guidance recommends that service providers be deemed to have complied (until proven otherwise) with their best efforts obligations under Article 17 (4) (b) and (c), in the light of Article 17 (7) if they have acted diligently as regards content that is not manifestly infringing, taking into account the relevant information from rightholders. By contrast, service providers should be deemed not to have complied (until proven otherwise) with their best efforts obligations under Article 17 and be held liable for copyright infringement if they have made available uploaded content disregarding the information provided by rightholders, to include information on earmarked content.

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<sup>54</sup> European Commission Guidance, at p. 23.

<sup>55</sup> European Commission Guidance, at p. 23

<sup>56</sup> European Commission Guidance, at p. 23

## Conclusions

This authors' feelings on the Guidance are rather ambivalent. The Guidance was very much published at the eleventh hour. This tardy publication – a mere three days before the transposition deadline – had likely negative knock on effects for the national transpositions of the Directive, the publication of the Advocate General's Opinion in *Case C-401/19, Poland v Parliament and Council of the EU* and indeed the delivery of the CJEU's judgment in the same case.

The Guidance refers to five different types of review of content that could be conducted by a service provider. These include an “ex post human review”, a “rapid ex ante human review”, an “ex ante human review”, a “fast ex ante human review” and a “swift ex post human review”. Admittedly, some of these differences boil down to semantics, but the minor differences and subtle overlaps do nothing to help the coherency and cogency of the Guidance.

Some new and not altogether clearcut concepts are contained in the Guidance. Examples include: “manifestly infringing uploads”, “earmarked content” “content which could cause *significant economic harm* to rightholders” and, “blocking instructions”. While the Guidance provides criteria and practical examples of “manifestly infringing” uploads, it is almost inevitable that such a key concept will attract some level of confusion and controversy. The notion of “significant economic harm” is open ended and relatively imprecise. How is the word “significant” to be assessed? In absolute or relative terms? Just like the term “best efforts” in Article 17 (4), some of these expressions are just too vague and will almost certainly pose challenges to the principle of legal certainty.

The Guidance may be reviewed in the light of the recent CJEU judgment in *Case C-401/19, Poland v European Parliament and Council of the EU*. If the European Commission publishes new guidance, it may well offer recommendations on how the legislative safeguards contained in Article 17 could be implemented into domestic law. These safeguards, which were spelt out clearly by the CJEU in the aforementioned ruling, protect the right to freedom of expression and information of ordinary internet users.

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