

Facebook's Responses on the Implementation of EU Directive on Copyright

Directive (EU) 2019/790

Norway

Submission on behalf of Facebook Ireland Limited

INTRODUCTION

Facebook's mission is to give people the power to build community and bring the world closer together. Our services enable content creators of all varieties to express themselves, share their work, and promote their businesses. The recommendations provided herein are based upon Facebook's own experience in giving people a voice and enabling them to connect and be creative while at the same time helping copyright holders protect their content. Facebook believes that through cooperation and dialogue from all stakeholders--service providers, users, rights holders, national governments, and others--the balance between copyright protection and other rights, including free expression, can be preserved and strengthened.

Facebook appreciates the opportunity to provide this submission in relation to the implementation of the EU Directive on Copyright (2019/790) (the "**Directive**"). Below, we provide responses to those questions posed for the implementation of the EU Copyright Directive in Norwegian law ("the Law") that we believe would most benefit from Facebook's experience, as well as further comments that we believe will aid the Ministry in faithfully reflecting the Directive's intent.

Article 15 of the Directive

GENERAL REMARKS

Facebook supports the goals of Article 15 of the Directive, i.e., the protection of both "quality journalism and citizens' access to information". Facebook has already supported a wide range of publishers and publications by providing tools that they can use, free of charge, to expand reach of their content, to generate new subscriptions and to access and grow audiences around the world. Some of these tools greatly complement existing commercial tools available to publishers, thus allowing them to save considerable annual costs in their newsrooms.

Further, Facebook has trained more than 20.000 journalists in 2019 across Europe, Middle East and Africa free of charge on how to leverage our services to reach their audiences. Indeed, the overwhelming majority of links to press publications found on Facebook have been placed there by publishers themselves to increase engagement with users.

We believe the following factors governing an implementation of Article 15 are crucial to ensuring an effective and fair outcome:

A. Government entities should identify "press publications"

Norway should ensure the scope of Article 15 is clear to enable service providers to understand who may claim the ancillary right. Article 15 applies to "press publications

established in a Member State” but provides no clear means for platforms to identify a “press publication.” Article 2(4) and Recitals 55 and 56 of the Directive attempt to offer some clarity of the term “press publication,” but the offered criteria do not provide certainty or reliability.

Without clarification by the government, it is not clear how service providers like Facebook will be able to accurately, uniformly, and exhaustively evaluate every publication to determine whether it fits the definition of “press publications” in Norway, particularly given the scale of platforms’ operations. Nor does Facebook believe it is appropriate for online platforms to be put to the task of defining journalistic “press publications” or “news” entities given the importance that a free and independent press plays across the Union. What one platform may consider a news website that may take advantage of the neighboring right, another may consider a non-journalistic blog that is not covered by the statutory definition. In order to avoid any concern about unpredictable inconsistencies, Facebook asks the Ministry to clearly identify the specific publishers that may qualify as “press publications” for purposes of the ancillary copyright.

B. The definition of “individual words or very short extracts” is intended to be flexible

Any definition of the term “very short extracts” in Article 15(1) should provide clear, yet flexible, instruction to avoid any unintended user harm. Facebook displays headlines and extracts provided by publishers, for instance, in order to provide the context a user will need to decide whether to follow that link. Many times, it is the context provided on our service about a link that people use to understand what the destination is or determine whether the link is potentially harmful, such as spam, or even risks infecting the user with malware. This context provides a user the ability to make informed choices about what content they visit and are exposed to. Further, the Directive should facilitate orderly relationships between publishers and platforms, so that publishers’ wishes regarding their extracts can be reasonably honored by covered platforms; indeed, the Directive should not mandate platforms to make editorial judgments and decisions on the length, scope, or breadth of extracts.

C. Norway should preserve the freedom of contract between platforms and press publications

The Ministry should make clear that--consistent with the principles provided below in relation to Article 17--the ancillary right of Article 15 is subject to freedom of contract. Press publications should be free to partner with platforms concerning their ancillary right however the two entities deem appropriate. This includes allowing the parties themselves to decide on mutually-beneficial solutions for the display of affected content and to tailor their agreements to their evolving needs.

Article 17 of the Directive

GENERAL REMARKS

Facebook respects the purpose of the Directive and Article 17 as stated in Recital 3, which is to promote “a well-functioning and fair marketplace for copyright.” This marketplace can only thrive, however, if an implementation of Article 17 protects both intellectual property

protection and free expression by users, and set up legal systems that are reasonable, effective and fair to all who are impacted.

We believe there are five key principles governing an implementation of Article 17 that are crucial to ensuring an effective and fair outcome:

1. **Cooperation** should be required between service providers, rights holders, national governments, and others. A well-functioning marketplace requires good-faith cooperation between all participants.
2. **Proportionality** must be at the center of each part of national legislation. The solutions required of service providers should be flexible and proportionate to help them balance the interests of all stakeholders.
3. **Technical realities** must be acknowledged. Member States should not require solutions from service providers that are ultimately unworkable, nor should rigid implementation requirements preclude service providers from continuing to create new and more effective solutions.
4. **User expression** must be protected. It is important to recognize that users rely on service providers to express themselves, communicate, and gain access to information. The Directive is not intended to deprive users of their existing rights and freedoms under copyright law, and service providers must retain the flexibility to take this into account.
5. **Contractual freedom** should be preserved. A well-functioning copyright marketplace can only exist if the foundation of any marketplace--contractual freedom--is not impaired.

A legislative process that reflects these key principles will support the marketplace that the Directive and Article 17 was intended to promote.

RESPONSES TO QUESTIONS

Facebook appreciates the opportunity to provide its comments on the specific questions raised by the Ministry. Below, we offer our perspective for selected questions to support the Ministry's effort to faithfully implement the Directive.

Response to Question 37 - How should Article 17 (2) on the scope of the license agreement be implemented? Alternatives: 1) By legislating that agreements entered into between the sharing service and the licensee shall also apply to users so that the agreement has an extended effect; 2) introduce an exception which stipulates that users are free to upload works on which the sharing service has entered into an agreement; or 3) regulate that agreements entered into between the sharing service and a licensee shall include and regulate questions about the user's exploitation.

Article 17(2) states that "*where an online content-sharing service provider obtains an authorization, for instance by concluding a licensing agreement, that authorization shall also cover acts carried out by users ... when they are not acting on a commercial basis or where their activity does not generate significant revenues*". To ensure consistency with the Directive itself, and other territories implementing the Directive, the Ministry should consider the scope of license already provided for in this provision.

When seeking to implement Article 17(2), the Ministry may also wish to consider the practical challenges associated with the Directive's limitation on licenses not extending to users "acting on a commercial basis". Service providers will have no method to make such a determination. As a practical example: some users, such as "influencers," will occasionally post content as part of their own off-platform commercial agreements that may generate "significant revenue". Service providers will not be able to reliably discover these off-platform arrangements or distinguish similar posts that may not be done for commercial purposes. It may not be feasible to make determinations of "commercial purpose" at the user level, as--even in the case of users that self-identify as businesses on Facebook--much of the content posted by these users is personal or non-commercial in nature.

Importantly, the Ministry should not limit principles of contractual freedom that may allow rights holders and service providers to address the scope of rights in an authorization agreement, which may differ depending on the mutual interests of both parties. The Directive does not impede on a rights holder and service providers freedom to contract around the obligations covered under the Directive. In fact, the Directive encourages an open marketplace to allow both parties to freely determine the terms of their agreement.

Response to Question 38 - Can and should the obligation to obtain a permit under Article 17 (4) be specified? For example, if a service contains a large amount of a certain type of work, is it sufficient to enter into agreements with collective management organizations that represent the licensees of such works and major players, or must agreements also be entered into with smaller players? Can sharing services be considered to have "done their utmost to obtain a permit" if they refuse an offer of a license agreement, including if the licensor makes unreasonable demands on the license fee?

To best effectuate the Directive's intent with respect to this provision, we believe the following should be taken into account:

- *First, the methods used to obtain a permit under Article 17(4) should not be narrowly limited because the Directive did not intend to dictate what form of authorization is necessary to meet the authorization requirement.* The Directive envisioned an open "marketplace for copyright," where rights holders could authorize their works via a variety of means, values and methods. For example, Recital 69 of the Directive states that "*where online content-sharing platforms obtain authorizations, including through licensing agreements...*", highlighting that licensing agreements is one form, but not the only form of authorization envisioned by the Directive. The Law should avoid any implication that authorization may only be obtained through specified methods, such as only via traditional, one-to-one licensing negotiations that have very high transaction costs and will not be proportionate in many instances. Instead, the Law should make clear that authorization can be done through a variety of means, subject to the principle of proportionality and other fact-specific circumstances.

As one example of a modern means by which authorization may be done, Facebook has developed Rights Manager, a system available for rights holders to provide full control over their video, audio, and image content, including disabling access to their

content in appropriate circumstances. Rights holders of varying sizes also use Rights Manager to authorize user uploads of content in exchange for various forms of value offered in our tool, such as monetization where appropriate, data, insights, and promotional opportunities. If a rights holder decides that a different value is more in line with their business strategies, or if the value offered via Rights Manager does not meet their needs any longer, they can unilaterally change their settings with no lengthy renegotiation of highly complex contracts. Authorization can be done quickly, seamlessly, and a rights holder can change how they want to manage their content instantly. We believe the Rights Manager system can serve as a model for how modern authorization for content online can operate, and scale, to benefit the entire ecosystem.

As a result, we believe that the Law should not limit the “marketplace for copyright” by requiring particular methods or means for obtaining authorization. Instead, the Law should provide that any number of methods authorizing copyrighted works can be deployed, including use of: (a) scaled authorization systems; (b) authorization agreements in exchange for non-monetary value; and/or (c) traditional licensing agreements where appropriate and proportional. The Law should endorse these open, more modern forms of authorization, and avoid any implication that only specified, narrow systems for authorizing content are required to constitute “best efforts” for authorization.

- *Second, the Law should note that while collection management societies (“CMOs”) may be one mechanism to authorize content, contractual freedom must persist and parties should be free to engage, or not engage, with one another if not in their mutual best interests.* Article 17 does not identify the specific mechanisms to authorize content, nor the specific parties that must be used to obtain it, and for good reason. Marketplaces can only thrive when parties retain the contractual freedom to engage (or not engage) when in their mutual best interests. Placing specific stakeholders or methods above others would interfere with contractual freedom and impair the very marketplace the Directive intended to promote. We believe that a faithful interpretation of the Directive will not require authorization to be done via any one mechanism or stakeholder.
- *Third, the Law should state that service providers are not required to accept all licensing offers.* Recital 61 of the Directive states that licensing agreements between rights holders and service providers must be fair and keep a reasonable balance between *both* parties. If a “fair” balance is to be kept between both parties, service providers and rights holders must be free to determine what terms are appropriate to authorize content, and must be allowed to reject offers not in either party’s best interest. It would be disproportionate--and an impairment to the freedom of contract--to require service providers to accept an authorization offer for content that are unfair, against business interests, has little impact on a service (as is the case with content not prevalent on a service), or that exceeds the value that content brings to the service provider.

Nor does Article 17(4)(a) create a mandatory “obligation” for service providers to authorize content. Indeed, the Directive’s provisions expressly contemplate that

authorization of content may not be obtained. For example, the Directive: (a) requires only that “best efforts” are attempted to obtain an authorization, not any or all possible effort; (b) expressly provides for alternatives where authorization cannot be obtained, such as the blocking and reporting provisions of Article 17(4)(b)-(c); and (c) states that the fundamental freedom of contract should not be affected by Article 17, which includes the freedom to choose with whom to do business. Obliging service providers to enter into contracts with rights holders when against the parties’ mutual best interest would be disproportionate, and inconsistent with the Directive itself. If the Directive’s intent and contractual freedom is to be preserved, service providers and rights holders must be free to authorize, or not authorize, content in line with both party’s mutual best interests and proportionality. Thus, it should be clarified in the Law that service providers have no “obligation to contract”.

Response to Question 39 - Sharing services shall deactivate access to material that the licensee has notified of and prevent future uploads, cf. Article 17 no. 4 letter c, at the same time as they shall not prevent legal material from being uploaded by users, cf. Article 17 no. 7. Certain methods of preventing access to illegal material will in practice also be able to prevent the uploading of legal material. The Directive therefore proposes that a balance of interests be struck using methods to prevent access to illegal material (Article 17 (4) (c)) against the protection of users' rights (Article 17 (7)). What are the relevant points of departure and factors in such a balance of interests?

Facebook believes that it is critical to a workable implementation of the Directive that a balance be struck between the interests of all stakeholders, including the balance between IP protection and the protection of user freedoms. We appreciate the Ministry’s focus on the importance of balancing robust tools for right holders with protection of legitimate user expression.

Highly specific and rigid technological requirements surrounding IP protection systems would disrupt this balance and likely lead to the restriction of users’ ability to legitimately express themselves. Therefore, we respectfully request the Ministry to consider the following factors to effectuate this balance between IP protection and user freedoms:

- Service providers must have latitude to develop solutions that protect user freedoms and lawful speech. Technical solutions that prevent the availability of content must balance the interests of users, service providers, and rights holders. Service providers should be empowered to effectuate this balance in the ways best suited for their particular service, based on factors often unique to them. For instance, Facebook’s Rights Manager implements various measures to protect user expression, including, among many others: (a) not matching minimal overlapping content that is unlikely to be accurately matched (a “false positive”); (b) setting matching technical thresholds and policies to limit over-blocking of likely lawful content; (c) selecting the actions available to rights holders for specific content types based on need and the risk of over-blocking; and (d) providing access to Rights Manager only to legitimate rights holders who are unlikely to misuse this powerful tool.

We have found that this mix of tactics, in addition to others, ensures user freedoms are protected while helping rights holders manage their rights. But these tactics are always being refined as bad actors shift tactics, and as lawful expression changes

forms. Ensuring that service providers have latitude to develop and refine these measures is especially important to account for these behaviors that will shift over time.

Moreover, service providers need latitude to develop policies that account for technical realities. Identifying lawful content by purely technical means may be difficult--if not impossible--for content recognition systems. This is especially evident given that these tools cannot understand "context," and cannot make legal determinations. Service providers need the ability to develop systems to account for these technical realities, which highly stringent legislative obligations may limit.

- *Service providers should be empowered to prevent misuse of their tools.* In our experience operating content recognition systems such as Rights Manager, rights holders may occasionally misuse content tools by claiming to own content they do not actually own, or by providing incorrect information as to the scope of their rights. In our experience, this happens both inadvertently, and sometimes intentionally. The Law should note the very real challenge of misuse--and state that OCSSPs may take steps to prevent it in line with Article 17(7) and the protection of lawful expression, such as restricting access to such tools or sensitive features where the risk of misuse is apparent.
- *Rights holders must cooperate with service providers to protect legitimate expression.* The Law should clearly link a service provider's obligations under Article 17(4)(b)-(c) to the protection of the critical forms of speech under Article 17(7) in the same manner as the Directive. Under Article 17(7) of the Directive, it states that "*the cooperation between online content-sharing service providers and rights holders 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...*" For instance, Rights Manager is a powerful tool that once provided to a rights holder, could be misused to over-block lawful expression. With that power should come responsibilities for rights holders to use the tools offered to them appropriately and consistent with our policies. Rights holders must cooperate with service providers and provide accurate, necessary and relevant information, such as reference files, and take steps to avoid over-blocking in order for Facebook to operate its Rights Manager tool effectively and ensure legitimate speech is not impaired.

Response to Question 40 - To what extent does the Directive allow sharing services to use automated solutions, including identity and filtering technologies, to prevent access to material notified by the rights holder, cf. Article 17 (4) (c)? Is there a risk that such automatic solutions will in practice be able to prevent the uploading of legal material, cf. Article 17 no. 7?

In recent years, some service providers have developed content recognition systems to prevent the upload of copyrighted material on their platform. For example, as provided above, Facebook's Rights Manager tool allows rights holders to ingest their content, and in some cases, automatically block user uploads that match that rights holder's content.

However, developing technology to address the complex lawful use of content is challenging. For example, some sensitive features found within matching technologies, such

as auto-blocking technology, can be prone to abuse if provided to rights holders who are not able to properly use such features. This misuse can cause significant disruptions to legitimate expression. To address this challenge, Rights Manager currently allows only its rights holders that have demonstrated a need for such sensitive features and the ability to use them properly without the restriction of lawful expression. By offering appropriate functionality to different stakeholders, Facebook is able to drastically reduce the risk of widespread over-blocking and encroachment on legitimate expression.

The Law should not preclude or impair these methods, so we can continue to balance the interests of both rights holders and users, while maintaining the goals of the Directive.

Response to Question 41 - The exceptions in copyright for citation, criticism, reviews, as well as use in caricature, parody or pastiche have previously been considered voluntary for Member States to implement. The exceptions are now made mandatory within the framework of the directive. Do the exceptions in Article 17 (7), second paragraph, require amendments to the Norwegian Copyright Act?

To faithfully implement the Directive, the Ministry should include the full list of copyright exceptions provided under Article 17(7) under both their transposition of Article 17, which may include amendments to the Norwegian Copyright Act. This includes the copyright exceptions for quotation, criticism, review, caricature, parody and pastiche. As highlighted above, it is important to recognize that users rely on service providers to express themselves, communicate, and gain access to information. The Directive is not intended to deprive users of their rights and freedoms, and as a result all exceptions and limitations that are covered under Article 17(7) of the Directive should be taken into account in the Law to effectively protect these freedoms.

Response to Question 43 - How should the alternative dispute resolution mechanism under Article 17 (9) be implemented? Who should bear the cost associated with the case processing?

Article 17(9) of the Directive states that “*Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes [and that] such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law...* ”. These disputes are between rights holders, who claim an infringement of their rights, and users, who claim a legitimate right to utilize content. Although service providers can offer tools for the parties to address these disputes, service providers are very often not privy to the scope of the copyright or relevant licensing arrangements a rights holder may or may not have with a user, or have other details that have bearing on when content is infringing. As a result, there is limited relevant information that service providers could provide in an out-of-court proceeding beyond that which will be provided by the parties to that dispute (rights holders and users). To aid the out-of-court redress mechanisms process in operating efficiently, we respectfully request the Ministry to ensure service providers are not identified as central bodies to these proceedings and may opt in voluntarily to the proceedings.