CEPI
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AUDIOVISUAL
PRODUCTION

# CEPI Position Paper

## *Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services*

CEPI and its members welcome the Commission's efforts to improve the current legal framework and wish to contribute to the Commission's objective to lay down more "consistent" rules for the responsibility of digital services and effectively fighting illegal practices online.

Contents



### 1. General comments

- Importance of the DSA for independent producers

CEPI would like to properly communicate the importance of the Digital Services Act (DSA) proposal for independent producers, and the audiovisual sector in general. The eCommerce Directive, and now the DSA proposal, establish the necessary conditions to enforce our sector's intellectual property rights in the digital single market. Any limitation in the ability to enforce copyright diminishes the value of copyright in Europe and significantly impacts rightsholders and their distribution partners. For the AV sector, the DSA is an important step

towards enforcing the rule of law, as it includes provisions by which online intermediaries must act against illegal content – including copyright infringing content - as well as against services offering illegal content (for example piracy sites).

- Relationship between the DSA and the copyright directive and its implementation

The Digital Services Act is intended as a horizontal framework covering all categories of content, products, and activities of intermediary services, thus it is of great relevance to the audiovisual sector. In certain area, once adopted, the DSA will be complemented by specific rules (*lex specialis*). Both horizontal and specific legislations must be properly articulated in order to provide legal certainty, but also to prevent any loopholes of the legal framework. This is particularly important for the DSA and the copyright Directive adopted in 2019. Article 1(5) of the DSA specifies some of the relevant *lex specialis* rules and in particular states that the **DSA Regulation "is without prejudice to the rules of Union law on copyright and related rights,** which establish specific rules and procedures that should remain unaffected" (see Article 1(5)c and Recital 11). This would be the case with regard to Article 17 of the DSM Copyright Directive, for example, as it covers specific online services defined in that Directive. However, given the overlap between the DSA and copyright legislation, particularly when it comes to procedural harmonization (notice and action, injunctions, orders for information), the vague assurances in Recital 11 and Article 1(5) are insufficient. **It is important to ensure that the tailored protection established by Directive 2019/790, Directive 2001/29/EC, CJEU Case law and relevant Member State and Union provisions relating to intellectual property rights are in no way weakened.**

With the same approach, any area not specifically covered by the copyright rules will fall under the rules of the DSA. For example, the DSA will apply with respect to certain intermediaries that are not covered by Article 17 of the DSM Copyright Directive. As a result, the DSA will have relevance to copyright infringement in a number of important areas.

- Comments on the scope and definitions of the DSA

CEPI welcomes the geographical extension proposed in the DSA, to ensure that all intermediary services providing services to recipients established or residing in the EU, regardless of the country of establishment of the service, are subject to the Regulation.

CEPI welcomes the provision in Article 12.2 which explicitly enables intermediary services to act on their own terms and conditions to enforce their policies and prevent misuse of their services.

CEPI is concerned by the thresholds set in the proposal to differentiate micro and small enterprises, online platforms and very large online platforms:

- Article 16 on the exclusion for micro and small enterprises, sets the threshold of exclusion at fewer than 50 employees and an annual turnover and/or balance sheet total which does not exceed 10 million EUR. CEPI feels that these criteria aren't relevant enough for the digital world, and do not take into consideration the average number of recipients of the services. Taking the number of recipient of the service into

consideration would ensure that the obligations set forth in section 3 of the DSA apply proportionally to the impact an online platform has on society.

- Finally, CEPI believes that certain provisions of the DSA, such as the provisions on trusted flaggers and repeated offenders, which apply to online platforms, should have a broader scope and apply to all provider of hosting services, in order to ensure their effectiveness. Similarly, obligations regarding the traceability of trader, also known as the Know Your Business Customer provision is currently limited to market places. This provision should be extended to services facilitating piracy and other illegal activities, including domain registries and registrars, server hosting providers, providers of content delivery networks, advertising and payment service providers, in order to effectively contribute to the fight against copyright infringement.

**2. Liability regime**

- Comments on the scope of the liability exemption for hosting services - Article 5 / Recital 18, 20, 21, 26

CEPI is highly concerned by the extended liability exemption provided by Article 5 to hosting services. The DSA proposal is an opportunity to strengthen cooperative responsibility across the internet to fight the spread of illegal content online. The provision of Article 5 falls short of this objective, and seems to broaden the liability exemption for platforms.

The DSA should explicitly exclude from liability exemptions any services whose main purpose is to engage in illegal activity or in the facilitation of illegal activity. By the same token, only services which comply with the provisions of the DSA should be eligible for liability exemptions per Articles 3-5. It is important that compliance with the due diligence obligations contained in the DSA proposal be a pre-condition for liability exemption eligibility contributes to a high level of safety and trust online. A conditional relation between the safe harbour provisions and the due diligence obligations would create an additional incentive for compliance with the due diligence obligations, particularly for intermediaries that can afford any resulting fines for non-compliance and often factor them in as a cost of doing business.

**In addition, The DSA liability exemption should only applies to neutral services and make clear that services which claim to be neutral but promote or optimize certain content, or services which engage or facilitate illegal activities must remain liable.**

For this reason, the DSA should further clarify the limits of the liability exemption afforded by article 5.1, by strengthening the concept of neutrality. This concept, currently mentioned in recital 18, should be directly brought into article 5. In particular, article 5.3 should build on existing case law to incorporate criterion of neutrality, taking into consideration the following:

- *Optimising the presentation or promoting the content*[1] have been clearly identified as taking an active role. This should be reflected in the text.

[1] CJEU C-324/09 L'Oreal v. eBay

- The automatization of certain platform functionalities does not equate to a neutral approach to the content it host.
- By referring to "deliberately collaborate" recital 20 provides a very high threshold trigger liability. The DSA should ensure that any service "engaging in or facilitating" illegal activities should not benefit from the liability exemption.

The DSA should further acknowledge rightholders dependency from providers of intermediary services in their fight against copyright infringing content. Recital 26 of the DSA, by explicitly calling on rightsholders to attempt to resolve conflicts relating to illegal content without involving providers of intermediary services, undermines the reality of the situation.

Directive 2001/29/EC[2], recital 59 establishes that *In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end.* However, recital 26 of the DSA explicitly calls on rightsholders to attempt to resolve conflicts relating to illegal content without involving providers of intermediary services. Considering that for most copyright infringement content, rightsholders have no other choice but to reach out to intermediaries to enforce their rights, it is thus important that the DSA remain coherent with the approach taken by Directive 2001/29/EC, and emphasize the role intermediary services play in fighting illegal content.

- Good Samaritan clause - Article 6/ Recital 22, 25

CEPI is highly concerned by the proposal of the Commission to create additional opportunities for intermediary services to remain exempt from liability when carrying own initiative voluntary investigations. The good Samaritan clause, as proposed, risks broadening the liability exemption for intermediary services playing an active role without necessarily strengthening the fight against illegal content on such services.

In addition, the proposal does not provide for any standards for such own-initiative investigations or other activities. This lack of specificity could lead platforms to implement ineffective measures for the sole purpose of fully benefiting from the liability exemption. It is also worth noting that many online platforms already use automatic tools for the detection of some content, with, in the case of copyright infringement, limited success.

### 3. Removal of illegal content

- Notice and actions - Article 14

The rapid growth and diversification of digital services has been accompanied by a parallel increase of internet piracy. This phenomenon even increased during the lockdown period following the outbreak of the Covid-19 Pandemic. According to MUSO, piracy increased by 33% during the lockdown and a recent report by FAPAV has confirmed this trend, reporting a high increase in the number of individual acts of piracy especially among young users . The presence of illegal content is not an isolated issue to tackle. Many of the services offering this kind of content, practice "aggressive advertising" and collect sensitive data without user's

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

consent. The effective removal of copyright infringing content effectively increases consumer protection and prevents unlawful services from making illicit gains.

CEPI is concerned that the proposals in Article 14 might create overly burdensome procedures for rightsholders who attempt to have their copyright protected, by requiring too much information. These requirements risk delaying rightsholders from having their rights enforced. In order to ensure safety and trust online, notice and action procedures should be proportionate, effective and future proof. The Commission's proposal to harmonise notice and action processes, is welcome - but fails to require any prompt and meaningful results. The DSA should therefore be amended to include a clear obligation for intermediaries to:

- **act expeditiously upon receipt of a notice gaining knowledge of illegal content, by removing or disabling access to it;**

- **prevent content that has been taken down from reappearing (i.e. stay-down).**

Article 14.2(b) requires the provision of clear electronic location (exact URL or URLs) of the infringing content. CEPI believes that this "clear electronic location" would directly limit the efforts rightsholders have taken with platform to implement dynamic "stay down" approaches, where efforts are made to ensure that copyright infringing content remains disabled or removed. As copyright infringing content is often re-uploaded with a different URL within minutes of having been disabled, such a dynamic approach is necessary to ensure the effectiveness of the enforcement. Requiring specific URL or URLs could also lead platform to refrain from taking down the same illegal content from other electronic locations than the one specifically included in the notice. In addition, in the fight against piracy and illegal content removal, URLs are an obsolete indicator of the location of infringing content. Piracy is more and more present within mobile applications and Open Source systems which do not require the use of URLs. National courts have increasingly deployed this dynamic concept in the context of decisions made to block access to content, thus recognizing the dynamic nature of internet activities. CEPI believes that Article 14 should be technology neutral and be extended to include stay-down provisions.

The proposed provisions of Article 14 could be considered as lowering the standards developed in Article 17.4(c) of the Copyright Directive which requires content-sharing service providers under certain condition to "disable access to (…) notified works(…) and make best efforts to prevent their future uploads". In addition platforms must make their best effort to ensure unavailability of specific work (Copyright Directive Article 17.4(b)).

- Trusted Flagger - Art. 19/Rec 46, 58

CEPI generally welcomes the concept of trusted flaggers as an additional tool to help rightsholders by facilitating and accelerating the process of removal of infringing content by intermediaries. However, CEPI considers that the proposal put forward by the European Commission is not sufficiently robust to enable the full potential that the concept of trusted flaggers could offer:

- Scope of the article: Notice by trusted flaggers should not be limited to online platforms, but should apply to all providers of hosting services to whom the notice and action provision foreseen in Article 14 applies. Article 19 should thus be moved to Section 2 of Chapter III of the proposal.
- Process: In order to successfully introduce the concept of trusted flaggers in the law, the added-value they create for rightsholders and service providers in comparison to the standard notice and action mechanism foreseen in Article 14 must be clearly identified. The purpose of trusted flaggers is to facilitate, both for platform and victims, and to further accelerate, the removal of illegal content online through a specific process based on the trustworthiness of flaggers submitting notices. Once organizations are considered having the "*necessary expertise and carry out their activities as trusted flaggers in a diligent and objective manner, based on respect for the values on which the Union is founded*[3]", the burden of assessing the illegality of a content is then shared between the platform and the trusted flaggers. Consequently, notification originating from trusted flaggers should not only be treated with priority but be automatically acted upon by the service provider.

  Eligibility – CEPI is particularly concerned by certain eligibility criteria proposed in Article 19.2, in particular the criteria of collective interest representation. While expertise and competence, diligence, objectivity and independence from platforms are key elements constituting trusted flaggers, it is unclear what the added value of limiting the status of trusted flaggers to collective interests representative organizations would be. Digital Services Coordinators are responsible for awarding the status of trusted flaggers. Any applicant who can demonstrate expertise and objectivity should be eligible for this status.

- Repeat offenders - Article 20/Recital 47

CEPI welcomes the introduction of provisions to address the issue of repeat offenders. In order to be effective in providing online safety and tackle illegal content, the DSA should consider the following additions:

the current proposal provides the possibility for platforms to "suspend for a reasonable period of time" recipients of the service that frequently provide manifestly illegal content as well as complainants that frequently submit notices or complaints that are manifestly unfounded. CEPI is concerned by several aspects of this provision:

- Scope of the article: The concept of repeat infringer should not be limited to online platforms but should apply to all providers of hosting services to whom the notice and action provision foreseen in Article 14 applies. Article 20 should thus be moved to Section 2 of Chapter III of the proposal.
- In addition to the suspension of services, the provision should also include the possibility for platforms to terminate a repeat offenders account/ provision of service, particularly in cases of repeated suspensions.

[3] Commission Recommendation 2018/334, Chapter II, Paragraph 27.

- Recital 47 provides some degree of explanation as to what qualifies as manifestly unfounded notices or complaints. However, Article 20 falls short of providing details as to what "frequently" means.
- Furthermore, in order to be effective, Article 20 must include tools to ensure that identified repeated offenders do not use different/new account following the suspension/deletion/blocking of their original account. The Know Your Business Customer rules foreseen in Article 22 should be further extended to ensure and support the proper enforcement of the provisions foreseen in this Article 20, and effectively reduce the presence of repeat offenders on online platforms. In addition, the proposal to include stay-down obligations for notified content in Article 14 would contribute to the effectiveness of this provisions.

- Industry standard for notice and action - Article 34

CEPI welcomes the Commission proposal in Article 34 to support and promote the development of common standards for the electronic submission of notices generally and from trusted flaggers.

However, CEPI is highly concerned by the risk of such standard to be developed in a way that make notification overly burdensome for rightsholder. The proposal should clarify the general objective of such standards as to facilitating the process of notification as foreseen in Articles 14 and 19, for the primary benefits of individual and organisation submitting such notice.

In addition, all industry sector representatives should be able to participate in the consultation and development of such standards.

**4. Fight against piracy**

- KYBC - Traceability of traders - DSA Art. 22 and Recital 49

The proposed Regulation provides for rules requiring platforms to know the identities of traders using their services to promote messages or offer products or services to EU consumers. Unfortunately, the scope is too narrow, as it is limited to marketplaces, thereby excluding infrastructure services.

- CEPI is disappointed by the limited scope, as such provision is an opportunity to support legal enforcement of copyright across the internet as well as ensure that "what is illegal offline is illegal online." Know Your Business Customer (KYBC) obligations should be extended to services facilitating piracy and other illegal activities, including domain registries and registrars, server hosting providers, providers of content delivery networks, advertising and payment service providers. Whether the services are provided knowingly or not to, this principle would ensure that operators and facilitators of commercial-scale copyright infringing sites acting in bad faith can be identified by intermediaries and ensure rightsholders' access to verified information as provided by both Article 8 of the Enforcement Directive 2004/48/EC on the enforcement of intellectual property rights and Article 5 of the E-Commerce Directive.

- CEPI also urges the Commission to verify and not simply include e-mail, telephone numbers and IP addresses as mandatory information collection per Article 5 of the E-Commerce Directive and made available to legitimate access seekers.
- The NIS2 proposal might be considered a complementary tool to support enforcement against illegal online operators, but it will realistically take effect much later than the DSA and its scope in terms of IPR rights enforcement is limited to domain name services.

## 5. About CEPI

(CEPI)The European Audiovisual Production was founded in 1989, to organise and represent the interests of independent cinema and television producers in Europe. Today it represents approximately 8000 independent production companies in Europe, equivalent to 95% of the entire European audiovisual production industry.

The audiovisual sector is a cornerstone of the EU's socio-economic pillar and a priceless strand of the EU's cultural fabric. According to a study recently published by EY, the audiovisual sector was worth €121.7 billion in 2018, accounting for approximately 22% of the industry globally and accounts for 1,049,000 jobs in direct employment in 2018. Moreover, it is important to recall that 2019 was a record-breaking year for cinemas worldwide and that the cinema industry in Europe was on a growth trajectory, with an unprecedented 1.34 billion admissions across European territories in 2019. Lastly, according to the European Audiovisual Observatory the share of independent TV productions is high accounting for 74% of TV fictions titles in 2017.[4]

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[4] IRIS Plus2019-1 The promotion of independent audiovisual production in Europe European Audiovisual Observatory, Strasbourg, May 2019 ISSN 2079-1062