European Visual Artists

Recommendations on the Digital Services Act

26th March 2021

About us

European Visual Artists (EVA) is representing 28 European collective management organisations (CMOs) in 23 countries for authors of fine arts, painters, sculptors, photographers, illustrators, designers, graphic designers, street artists and architects. They manage the rights of over 130.000 artists.

Scope and Definitions (Art. 1-2)

We welcome the Digital Services Act proposal as it endeavours to bring more transparency in the overall functioning of the internet in Europe, a lack of which has costed years of missed opportunities and misbehaviours towards visual authors' rights online. We also welcome that this proposal is not intended to alter the Union law on copyright (Art. 1(5)(c)), although we do expect the proposal to bring positive changes to the general conditions of the online market where CMOs provide licenses for the use of internet uses. In this sense we see positively that Recital 12 underlines that "illegal content" includes unauthorised uses of copyright protected works.

- In view of closing the online transparency gap completely, the DSA should set out some due diligence obligations also for **image search engines,** online platforms' **private groups**, and **instant messaging** (Whatsapp, Facebook messenger etc…) within the frame of data protection (for instance by studies of user behaviour);
- We recommend Art. 2 on definitions to **include a definition of "User",** because there can be different types of users (e.g.: traders and buyers on marketplaces) and due diligence obligations like the transparency reports should cover all user types.

Chapter II – Liability of providers of intermediary services

We take note of the Commission's will to keep the substance of the E-commerce directive's safe-harbour provisions. However, we recommend clarifying the distinction between the **active and passive role** of the providers by taking fully into account relevant ruling of the Court of Justice of the European Union, such as L'Oréal v. eBay (C-324/09)[1]. Online providers should be considered liable for all acts potentially increasing incomes including the presentation, promotion, recommendation and organisation of content.

Art. 6 - Voluntary own-initiative investigations

We believe the wording of Art. 6 leaves too much room for potential abuses. The purpose of incentivising online providers' own investigations is positive, but it should be made clearer that knowledge or other activity on illegal content resulting from voluntary investigations need to trigger providers' actions to tackle the problem. In absence of such reaction, providers should not be exempted from liability.

- We recommend **including the wording of Recital 22 into Art. 6** ("*In order to benefit from the exemption from liability for hosting services, the provider should, upon obtaining actual knowledge or awareness of illegal content, act expeditiously to remove or to disable access to that content.*").
- Furthermore, on the line of Art. 14(3) it would make the situation clearer if recitals could underline that exemptions from liability under Art. 6 fall when the provider receives a substantiated notification following Art. 14, especially if that notification comes from a Trusted flagger (Art. 19).

Chapter III – Due diligence obligations

Art. 13 and 23 - transparency reporting

We welcome the provisions on transparency reporting, which would contribute fixing a transparency gap that online copyright licensing has suffered until now.

- For Art. 13(1)(a-b) to be really informative at no additional cost for online providers, we recommend these transparency reports to be detailed enough to point out the number of orders and notices received on grounds of **copyright infringement** (i.e. distinguishing from other types of IPR infringements).

[1] CJEU, L'Oréal v. eBay, C-324/09.

- It should be possible for **independent auditors** to verify all information provided in transparency reports at the request of collective management organisations. Otherwise, information could be inaccurate, vague or misleading. Transparency also means possibility to audit what is declared.

Art. 14 and 19 - Notices & Actions and Trusted Flaggers

Until now, collective management organisations and individual visual artists could not rely on notice and actions mechanisms because online providers did not react, concrete follow-up came too late, mechanisms were sometimes too complex and too much time would go wasted for little or uncertain return, being limited to license fees without penalties or reimbursement of costs. We are confident that this situation can change if N&A mechanisms are clarified, and follow-up obligations are introduced. Especially, we are confident that collective management organisations meet all the requirements to be recognised as Trusted Flaggers according to Art. 19(2), as CMOs are authorised to operate by national ministries and already comply with the strict requirements of the CRM Directive 2014/26/EU[2]. We welcome that Recital 46 explicitly points in this direction.

- We recommend making the provision in Art 20(1) on **suspension of infringers a possible direct consequence of N&A mechanisms**, to give the tool more certainty for the protection of copyright online.
- We recommend **Trusted Flaggers to cover all hosting services**, not only online platforms and therefore to move Art. 19 to section 2 of Chapter III.

Art. 20(1) - Measures and protection against misuse

We welcome the introduction of the principle of suspension of copyright infringers, but we recommend clarifying the wording of Art. 20(1) in the following manner:

- the word "reasonable" is too vague. The **suspension period should be more specific** and not below 6 months for example through some kind of parameters. Collective management organisations could use the suspension time to invoice or negotiate licenses or settlements with the copyright infringer;
- the word "frequently" is too vague. **Adding Art. 14 notices as a condition to trigger suspension** can help making the tool more effective.

[2] DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

- The word **"manifestly" should be deleted** because it does not work for the copyright sector. E.g.: when a reproduction of a painting is made available online, the viewers cannot understand whether that reproduction is or is not authorised (therefore: illegal) by the mere sight of it. The copyright license (or its absence) does not change the nature of the work of art itself. The visual repertoire is more concerned than others due to the posting of entire works under an exception, such as report on current events and the subsequent use without permission by third parties. In this sense, unauthorised (illegal) works will never be "manifestly" illegal. Deleting this requirement would make the paragraph workable also for visual authors.
- We recommend **Art. 20(1) to cover all hosting services**, not only platforms, and therefore to move Art. 20 to section 2 of Chapter III.

Art. 22 - Traceability of traders

We warmly welcome that following Recital 49, this provision was introduced with IPR holders in mind. CMOs are often confronted with the fact that entities selling or making profits on unauthorised works in online marketplaces are not easy to find and contact. Therefore, any possibility of licensing, invoicing, or settling infringements becomes *de facto* impossible. If platforms could make available to CMOs the information listed in Art. 22(1) when relevant and needed, things could finally change for the better, with a very positive impact on European artists. CMOs represent rightsholders collectively, they comply with strict transparency rules dictated by the CRM Directive 2014/26/EU and are formally and publicly recognised by national ministries. As such we expect CMOs to qualify as "private parties with a legitimate interest", as mentioned in Recital 49.

- We recommend to further clarify Art 22(5) by **including Recital 49 wording of** "**private parties with a legitimate interest**", to make sure that CMOs are unequivocally eligible for this tool.
- We also recommend making sure that legitimate private parties' access to traders' **information does not need to be actively mediated by public authorities** each time the need arises, otherwise the effectiveness of this new tool will sink under too much bureaucracy and will remain unused.

Art. 24 and 30 - Advertisement transparency

We warmly welcome additional transparency obligations concerning advertisements. Sometimes businesses use copyright-protected images for their advertisement campaigns

without asking for authorisation. Knowing what entity is paying for advertisements will allow visual CMOs to invoice them and thus pay the due remuneration to artists. Transparency on parameters used by algorithms to vehiculate advertisements is also welcome.

About EVA

European Visual Artists (EVA) represents the interests of authors' collective management societies for the visual arts. **28 European societies** are gathered under this roof as members or observers. They manage collectively authors' rights of close to **130 000 creators** of works of fine art, illustration, photography, design, architecture and other visual works.

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