I. 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 suggestions 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—platforms, users, rights holders, national governments, and others—the balance between copyright protection and other rights, including free expression, can be preserved and strengthened across the European Union.

Facebook appreciates the opportunity to provide this submission in relation to the EU Directive on Copyright (2019/790) (the “Directive”). This submission is principally focused on the terms of Article 17 of the Directive (relating to responsibilities of platforms), and Article 15 of the Directive (relating to ancillary copyright for publishers). Facebook looks forward to continuing its dialogue with the Federal Ministry of Justice and Consumer Protection (“BMJV”) as this public consultation process progresses.

II. Article 17 of the Directive

A. General Preliminary Remarks on the Directive (Section A.1 of the Public Consultation Notice)

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 Member States bear in mind the importance of both intellectual property protection and free expression by users, and set up systems that are reasonable, effective and fair to all who are impacted.

There are five key principles governing Article 17 that are crucial to ensuring an effective and fair outcome:

1. **Cooperation** should be required between platforms, 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 platforms 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 platforms that are ultimately unworkable, nor should rigid implementation requirements preclude platforms from continuing to create new and more effective solutions.

4. **User expression** must be protected. It is important to recognize that users rely on platforms 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. Platforms 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. Facebook looks forward to engaging with the BMJV further on how each of these principles may weigh on specific legislative language.

**B. Covered Platforms, Act of Communication to the Public (Section A.IX.1 of the Public Consultation Notice)**

Article 17 of the Directive applies to “online content-sharing service providers” ("OCSSPs"). Article 2(6) provides examples of services that are not to be considered OCSSPs—and thus not within the scope of Article 17—including, “electronic communication service providers as defined in Directive (EU) 2018/1972” and “online marketplaces.” Facebook appreciates the clarity provided in the Directive that certain services fall outside the purpose and scope of Article 17. The German government should similarly clearly exclude these services from the scope its implementing legislation.

**C. Licensing (Section A.IX.2 of the Public Consultation Notice)**

Facebook partners with numerous rights holders to bring certain content to our platforms. For example, Facebook has partnered with music rights holders in Germany and elsewhere to license music content on behalf of the people who use our services. However, these partnerships depend, in large part, on being able to identify owners of individual sound recordings and musical works. Indeed, only rights holders can know what rights they own, and in many sectors, it can be difficult—and sometimes impossible—for Facebook itself to identify accurate rights information for all rights holders and all content around the world that may be posted to our service. As a result, it is not feasible for platforms to engage in proactive authorization or licensing discussions with all rights holders, in all sectors, around the world, that may have rights in EU territories.
If the German government is to develop a workable marketplace for authorizing content, it should require cooperation equally from both rights holders and platforms. In this respect, rights holders should be expected to proactively identify themselves, and provide information related to the rights they own, to platforms. In turn, platforms should establish the authorization programs and systems that rights holders may take part in. Only with this type of cooperation will Article 17 fully achieve its intended purpose.

Importantly, governments should avoid impairing the fundamental right of parties to freely contract with one another. Fair, well-functioning marketplaces exist where parties retain the freedom to contract, and implementing legislation should not disrupt this freedom. For example, implementing legislation should not require parties to always authorize content on platforms if it is not in their mutual business interests—whether rights holders or platforms—and should not dictate the types of compensation that parties may find fair and valuable in an authorization negotiation. It is important that existing market practices, such as the freedom of contract, continue to persist in Germany following implementation of the Directive.

**D. Exclusion of Responsibility (Section A.IX.3 of the Public Consultation Notice)**

Article 17(4) of the Directive outlines the steps, that if performed by OCSSPs, will protect them from liability for unauthorized acts of communication to the public. This provision is an essential part of the Directive’s overarching legislative framework and is necessary for a fair and well-functioning marketplace for copyright. Facebook believes that the only way Member States can establish the marketplace envisioned by the Directive is to allow platforms flexibility in developing and maintaining the systems relevant to meeting the requirements of Article 17(4).

To that end, any requirement to render content unavailable—as envisioned by Article 17(4)(b) of the Directive—must be proportionate and allow platforms the flexibility needed to manage their systems without negatively impacting lawful user expression. For several years, Facebook has operated a tool called Rights Manager that allows copyright holders to protect their video content at scale across our services, and as a result has acquired a deep understanding of the challenges and nuanced requirements involved when providing for lawful user expression and rights protection online. Given this experience, Facebook can confidently say that flexibility is a necessary part of maintaining this important balance.

In addition to this much-needed flexibility, Germany should be cognizant of technological realities. Some types of content are simply not suitable for the systems envisioned by Article 17(4)(b), as noted in Recital 66 of the Directive, which provides that “in some cases availability of unauthorized content can only be avoided upon notification of rightsholders.” Germany should clearly recognize this principle in national law. There is no one-size-fits-all technology, and Germany should appreciate the challenges and realities of using technology to protect legal rights.
E. Permitted Uses (Section A.IX.5 of the Public Consultation Notice)

Maintaining the rights and freedoms of the people who use Facebook’s services is of paramount concern to Facebook. Article 17(7), which identifies the types of content that should not be disrupted by the Directive’s requirements, is an important protection within the Directive. Germany should pass national legislation that clearly provides platforms with the flexibility they need to build systems that ensure those protections can be put into practice. For instance, platforms that may develop automated systems to identify or render content unavailable under Article 17(4)(b) will not be able to adequately protect user freedoms unless they are given significant flexibility to calibrate their systems to avoid capturing lawful expression while identifying possible infringements.

F. Complaint Mechanism (Section A.IX.7 of the Public Consultation Notice)

Article 17(9) requires platforms to put in place a “redress mechanism,” or appeals process, that may allow users to have their content restored if there is a dispute over the disabling of their content. However, platforms face a considerable challenge when processing these types of appeals. Namely, if a platform restores content subject to an appeal, and a court later determines that the content was an infringement, the platform itself may be liable for copyright infringement. This puts platforms in a difficult position—having to risk legal liability for processing appeals that may only contain limited information, and do so in a timely manner. Under these conditions, platforms may be unable to grant good faith appeals due to the uncertainty about the extent of legal liability, and the purpose of Article 17(9) may never be fully realized.

That’s why Germany should implement clear “good Samaritan” provisions into national law. These provisions should state that a platform that processes user complaints of content removals in good faith cannot be held liable for copyright infringement based on the restoration of that content. Good Samaritan provisions are the most effective way to ensure that the redress mechanisms of Article 17(9) are allowed to function as intended, and protect lawful speech across Germany.

III. Article 15 of the Directive

A. The right of the press publisher to protect its ancillary copyright (Section A.VII of the Public Consultation Notice)

Facebook appreciates the Directive’s statement in Recital 54 that a “free and pluralist press is essential to ensure quality journalism and citizens’ access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society.” Facebook has already helped a wide range of publishers and publications by providing tools that they can use, free of charge, to distribute their content and to access and grow audiences around the world. Recognizing the value of journalism to a free society, in January, Facebook
announced its commitment to investing $300 million in news programs, partnerships and content worldwide. We look forward to working with the BMJV and continuing our ongoing business collaboration with press publishers on the implementation of the ancillary copyright as an additional effort to support journalism.

1. Government entities should identify “press publications”

Germany should clarify the scope of Article 15 in order to enable platforms to better 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.

It is not clear how platforms like Facebook will be able to accurately, uniformly, and exhaustively evaluate every publication to determine whether it fits the definition of “press publications” in Germany, 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 encourages the German government to themselves clearly identify the publishers that may qualify as “press publications” for purposes of the ancillary copyright.

2. 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.

3. Germany should preserve the freedom of contract between platforms and press publications
Finally, Germany should make clear that—consistent with the principles provided above in relation to Article 17—the ancillary right of Article 15 is subject to freedom of contract. The freedom of contract is an essential right in Germany, and 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.