CREATIVE COMMONS POSITION PAPER:

EU MEDIA FREEDOM ACT

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EXECUTIVE SUMMARY

Creative Commons (CC) is an international nonprofit organization dedicated to helping build and sustain a thriving commons of shared knowledge and culture. Together with an extensive member network and multiple partners, we build capacity, we develop practical solutions, and we advocate for better open sharing of knowledge and culture that serves the public interest. We must pursue a commons of knowledge and culture that is inclusive, just, and which inspires reciprocity — a commons that serves the public interest.

Creative Commons works to support sharing by artists and creators of all types, including journalists. As we explored in our recent Open Journalism series, journalists around the world are using Creative Commons licenses and open data to create and disseminate information in new ways. For instance, The Conversation is a nonprofit network of 8 international news sites publishing hundreds of useful articles of news and analysis each week, all written by experts, in 4 languages, and all available under a Creative Commons license. More generally, we focus on supporting better sharing of knowledge and cultural works more generally, and we work to ensure a diverse, thriving ecosystem where new types of creators and creativity can thrive.

We support the goals of the EU Media Freedom Act (EMFA) – ensuring a high quality, independent, pluralistic media environment that supports thriving democracies. An independent, plural media is central to a healthy, functioning democratic system, which, in turn, is the bedrock for citizens’ trust and confidence in politics and public institutions. We agree that independent nonprofit and public service media have a critical role to play in ensuring better sharing of information in the public interest. We also recognize concerns that important news and information might be improperly stifled by dominant, very large online platforms.
However, we have significant concerns about Article 17 & 18 and the way it creates special privileges for some incumbent, traditional media such as commercial newspapers and broadcasters, and in turn will disfavor other smaller and independent creators. It will also interfere with policies aimed at protecting users from harmful information. This provision has implications for how all people are able to share their creativity and knowledge online. We believe Article 17 and 18 as drafted undermine the Act’s goals of defending media pluralism, by creating special privileges for certain types of media entities and tilting the competitive playing field in favor of traditional, large media corporations. Moreover, it is ripe for abuse by purveyors of harmful misinformation and disinformation and other harmful content, requiring carriage and prominence for content that may violate a platform’s rules as well as applicable laws, including those protecting fundamental rights. Finally, even if more narrowly tailored, Article 17 would still raise many important practical questions in terms of application and enforcement.

We believe there may be less intrusive, fairer ways of achieving the EU’s ambitions of supporting media freedom. We provide a few initial ideas below and look forward to having the opportunity to discuss these issues with all relevant EU stakeholders. We believe the recently agreed Digital Services Act (DSA), as well as the Platform to Business (P2B) regulation, provide an existing framework, and it would be prudent to focus on enforcing those systems before taking further action on this narrow topic.

**DETAILED CONCERNS WITH ARTICLE 17 & 18**

Article 17 & 18 undermine the Act’s goals of media pluralism, favoring large, traditional media entities over others. Under Article 17, large online platforms would be expected to give special, advance notice and consideration to media providers when it comes to removal or restriction of their content. Put differently, some types of users of online services will be favored, while others are disfavored.

The exact scope of who counts as “media” in this article is not clear. Under one view, it is relatively narrow – the Act’s definition of “media” is focused only on a narrow set of “programmes or press publications.” As a result, it may unduly exclude novel types of providers, particularly in the online, digital environment.

Moreover, to apply this provision, media services must have editorial independence and be subject to either regulatory or co/self-regulatory requirements regarding their editorial responsibility. Online platforms are not well-positioned to determine who meets this requirement as they will be relying on media services’ own declarations. Because large publishers are most likely to have the resources to engage with companies and regulators to demonstrate their qualifications and pursue enforcement of these privileges, this provision may tilt the competitive playing field in their favor, leaving many smaller players unable to share their content in a fair manner. In turn, it would go against the very
goals of the Act in the first instance – namely, creating a free, fair, open and pluralistic EU media environment to support publishers of every size and style. Regardless of how this impacts the large platforms themselves, the harm will be felt by smaller creators who do not have the resources to receive favored treatment.

**Article 17 & 18 are ripe for abuse by purveyors of harmful misinformation and disinformation and other harmful content.** As noted above, the definition of “media” is unclear, and it is possible that the legal text will provide a very narrow definition. At the same time, it is important to note that a broader definition would not remedy issues with the draft Act; indeed, any definition is likely to be both overbroad and underbroad.

If platforms take a more permissive approach to who can benefit from Article 17 (out of a belief the Act defines “media” more broadly, a fear of liability, and/or to avoid tilting the playing field), this can be exploited to spread harmful misinformation. Providers of misinformation will simply claim that they are a media service, and thus effectively skirt platforms’ content moderation practices.

Even if platforms perform more due diligence on who will benefit from Article 17 (and thus likely tilt the competitive playing field), it’s important to recognize how even traditional publishers can and do sometimes spread harmful content. For instance, Sky News Australia posted numerous videos to YouTube claiming that COVID did not exist or supporting ineffective treatments like ivermectin, which were subsequently removed by YouTube. Under Article 17 as drafted by the Commission, YouTube may have had to refrain from removing such content when published by a covered media entity. Similarly, far right media may technically meet the requirements of editorial responsibility and independence, but still spread views that engender hate, harassment or even violence. For instance, recently in August 2022, YouTube suspended channels of a far-right Polish media group, wRealu24, which was responsible for hateful content. Under Article 17, YouTube could face potential legal threats for such actions. Again, regardless of the cost to large platforms, harm will be felt here by users and society.

Regardless, **Article 17 & 18 raise many important practical questions.** Again, platforms are not in a position to know who, on a country-by-country basis, fits the relevant criteria. They are bound to be both underbroad (leaving qualified entities out), as well as overbroad (bringing unqualified entities and/or harmful content within scope). There is also a risk that leaving such decisions with the individual platforms, which are often guided solely by economic concerns and incentives and which do not necessarily operate in the public interest, will result in diverging interpretations, leading to an inconsistent approach which undermines the EU’s single market.

The practical issues go further, however. For instance, while highly profitable online platforms certainly have extensive resources to create bespoke processes to consider requests from different sorts of content providers, some platforms do not. Wikipedia and other nonprofits with large user bases are not likely to have the same resources as other very large, commercial online platforms. Even some commercial platforms may also be small in terms of profit while having large user bases, and may not rely on centralized, resource-intensive trust and safety functions. Consider services like reddit
and Discord, which rely more on community moderation than centralized systems. As users move to decentralized services like Mastodon, this trend will only increase, and the Act is unlikely to provide a sound, future-proof basis as media rapidly evolves online. The practical challenge of having different flagging and communication for a wide variety of users is a burden that must also be taken into account for all players.

Other complications of the scheme also deserve further scrutiny. For instance, it is unclear how platforms will have to deal with conflict of law issues – e.g., what if a piece of content is subject to a legal removal obligation under another country’s laws (e.g., the subject of a DMCA removal request in the United States), but it is required to be kept up under EMFA?

**ALTERNATIVES**

We believe there are better ways to address the Act’s goal – ensuring that quality media remains available and is not wrongly removed from dominant online platforms, thereby negatively impacting better sharing of media content online. The Digital Services Act already provides opportunities for anyone to seek redress from a platform, and we believe it is premature to reconsider the balance struck there, given there is no evidence base to assess the impact of the DSA which has only recently been agreed. Instead, the media should apply the provisions of the DSA accordingly, and remove Article 17 and 18. Similarly, the P2B regulation already provides obligations for how platforms must treat businesses, including media providers. To the extent the Media Freedom Act considers additional measures necessary, it should start by encouraging further dialogue within the basic scheme of the DSA and P2B – e.g., empowering the Digital Services Coordinator to study ways to ensure media availability and bring parties together to work towards practical solutions in the public interest.