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GESAC's contribution to the European Commission Consultation on generative AI and virtual worlds

GESAC, through its 32 authors' society members – collective management organisation (CMOs) – represents more than one million creators in Europe from all artistic fields (please see www.authorsocieties.eu for more information).

GESAC welcomes this initiative of the European Commission (EC) to consult stakeholders as regards possible risks that generative AI and virtual world based services might pose for the market.

This contribution will present the views and perspectives of authors' societies that relate to the issues raised in the consultation, without however addressing individually each question raised.

As rightly noted by the current Consultation document of the EC, "(…) *the potential impacts of this new phase of digital transformation could be wide-ranging with new technologies, business models and markets. It has become clear in the past that digital markets can be fast moving and innovative, but they may also present certain characteristics (network effects, lack of multi-homing, "tipping"), which can result in entrenched market positions and potential harmful competition behaviour that is difficult to address afterwards*." GESAC hopes that its members' views and perspectives are helpful to the European Commission in its future considerations when dealing with the relevant virtual world and generative AI services both as guarantor of the EU law and competition law enforcer, bearing in mind the importance of creators in ensuring cultural diversity and a thriving market.

Virtual worlds:

As GESAC stressed in its contribution to the previous consultation of the EC dedicated to metaverse and virtual worlds, virtual worlds provide new opportunities for creation and artistic projects and could become an important new market for European creative content, attracting a new public and benefiting the economy at large. For its success and sustainability for the European culture and creation, ensuring a solid protection of creation and the rights of creators is essential. In this respect the role of copyright/authors' rights needs to be strongly underlined.

The nature of the involved copyright exploitations on virtual world based platforms can vary based on whether such platforms are centralised or decentralised, but in essence they involve the reproduction and communication to the public rights, for instance when a song is performed in concerts in virtual worlds, when a music is included in video-games or played as background in virtual shops or spaces, or when a protected image is included on virtual goods or used as part of advertising or artwork of activities taking place in virtual worlds, among others.

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We observe with concern that, on some occasions, the services undertaking the above-mentioned exploitations in virtual worlds consider and argue that their acts are not covered by the copyright framework applicable in the EU, putting forward the novelty of their business models, their establishment outside of the EU and their claim – unfounded – that complying with copyright rules can only impede their cross-border operations. Such an approach is totally erroneous and in complete contradiction with the applicable texts. Refusal to take a license is simply illegal. This needs to be borne in mind in the preparation of any policy initiative in this field, and even recalled in clear and strong terms.

Indeed, the European Parliament (EP) has recently adopted a dedicated Report on "policy implications of the development of virtual worlds – civil, company, commercial and intellectual property law issues"[1] with an overwhelming majority, underlining these crucial points. The EP Report rightly:

"*22. Underlines that the body of EU law on the protection of intellectual and industrial property rights, including copyrights, trademarks, patents, designs and trade secrets, fully applies to virtual worlds; stresses nevertheless that the development of virtual worlds poses new challenges when it comes to intellectual property enforcement, identification of infringers and issues concerning the conflict-of-law rules on applicable law and jurisdiction;*

23. Recalls that platforms operators, service providers and users in virtual worlds are under the obligation to respect right holders' exclusive rights and their right to fair remuneration; highlights that the use of content protected by intellectual property rights (IPR), including in digital form in an electronic medium, such as an NFT, requires authorisation through licensing or assignment, unless it is covered by any exception or limitation to IPR protection (such as private copy, education, research, quotation, review, parody or pastiche); reiterates the importance in this regard of providers ensuring transparency as to the scope of licences, including territorial licences, so as to ensure that users are able to determine what uses of IPR-protected content in virtual worlds are covered by the licences they hold and that creators and right holders are able to receive accurate and proper reporting on the actual use of protected works;

27. Notes that NFTs and other blockchain-based offers facilitate the continuous resale of assets based on copyright-protected works through online transactions and believes that appropriate and proportionate remuneration of authors for each resale of such assets needs to be ensured;"

It is also important to note that authors and composers increasingly experience imposition of so-called "buy-out" agreements for the use of their works by video-games and audio-visual producers based outside the EU, which are or can also be active on virtual worlds. These coercive buy-outs deprive authors from the exercise of their rights granted under EU law, and are only possible owing to the imbalanced negotiation power between the individual creators and the global services involved, as well as the real threat for authors of being blacklisted by such services, should they refuse the buy-out contracts.

Authors' societies (CMOs) have an important role in tackling this unfairness in the market and ensuring an appropriate and proportionate remuneration for authors. Such role should be underlined in any policy initiative in this respect. The Guidelines of the EC on "the application of Union competition law

[1] European Parliament resolution of 17 January 2024 on policy implications of the development of virtual worlds – civil, company, commercial and intellectual property law issues (2023/2062(INI))

to collective agreements regarding the working conditions of solo self-employed persons"[2] already noted that:

"*(37) (…), Union legislation may recognise the right of certain solo self-employed to rely on collective agreements in order to correct an imbalance in bargaining power with their counterparty/-ies.*

(38) This is the case of Directive (EU) 2019/790 of the European Parliament and of the Council (known as the 'Copyright Directive'), which has set out the principle that authors and performers are to be entitled to receive appropriate and proportionate remuneration when they license or transfer their exclusive rights for the exploitation of their works and any other subject matter protected by copyright and related rights. Authors and performers tend to be in a weaker contractual position than their counterparty/-ies, and Directive (EU) 2019/790 provides for the possibility to strengthen their contractual position in order to ensure fair remuneration in contracts for the exploitation of their work. Directive (EU) 2019/790 grants flexibility to Member States to implement this principle using different mechanisms (including collective bargaining), as long as they comply with Union law."

Moreover, the key role played by CMOs for creators and the public has been underlined by the European Commission in its report on the implementation of the Collective Rights Management (CRM) Directive (2014/26/EU), by referring to the acquis communautaire. This role includes, in particular, "*enabling rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets*", and being "*promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public*". The report also notes the importance of CMOs' role for the European copyright market in the recent modernisation of the copyright legal framework (Directive (EU) 2019/790 and Directive (EU) 2019/789): "*collective management is directly required by a number of provisions of the new legal framework and is expected to play an important role in the practical application of the new rules*" in line with the above-mentioned Communication 2022/C 374/02.

GESAC welcomes any opportunity to further cooperate with the services of the EC in defining policy perspectives or actions in this respect.

Generative artificial intelligence (GAI):

AI is widely used in the sector of creative works and such use will only grow in the coming months and years. GESAC members consider that there is an important role to be played by CMOs to accompany such use of protected works for AI training purposes by commercial AI developers, which requires the consent of creators and their remuneration.

GESAC notes with concern that the services developing or deploying GAI models advocate, both in the EU and across the world, for the application of exceptions to copyright/authors' rights to their acts, claiming that licensing of works and remunerating creators can be an obstacle for the launch of their services. This is both unacceptable and incorrect: not only do authors, under EU law, have rights that come into play when their works are used by GAI models and services but also there are simple and easy solutions to license such rights. Therefore, these principles need to be upheld in all new EU policy

[2] Communication from the Commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02

initiatives. The AI Act that is about to come into force in the coming months also underlines the need to respect copyright/authors' rights of creators and rightholders. When it comes to GAI, a crucial aspect of exercising the rights of the authors provided by EU law is to licence the use of works included as input to train the AI models. Therefore, transparency on the use of GAI as well as a detailed record keeping obligation and disclosure of the records in a way to enable rightholders to identify their works and to enforce their rights is absolutely necessary.

We recognise the fact that GAI – and the underlying language models – are trained on very broad datasets containing millions of copyright protected works and that due to the number of works used for training and the obvious difficulty of connecting the actual use of any specific work in the training of any given AI-generated output, exercising the rights for individual authors and small and medium sized creators and rightholders could be considerably challenging.

However, this should not be an excuse to allow the infringement of the creators' rights. This means on the contrary that the development of the most effective and functional licensing offers for the concerned services should be promoted and collective management is just such a means. In addition to ensuring appropriate remuneration of creators and their equal access to market, collective management gives GAI providers of all sizes access to a vast repertoire, where the licensing terms can reflect their use cases. This will make it easier and financially more viable for AI companies of all sizes to obtain a licence. At the same time, GAI companies – through licensing agreements with relevant CMOs – could gain greater assurance that they are not infringing on copyright when training their AI models and systems.

In this respect, it should also be recalled that not all rightholders are equal or have the same negotiating power vis-à-vis GAI providers. It is essential to ensure that no one is in a position to capture an important part of the market due to its stronger negotiation power, while the licensing of a wider and more diverse creative works or the rights of authors are left outside with no or inappropriate remuneration. The collective rights management model is capable of ensuring that all rights holders are represented on equal terms and that the competitive landscape is enhanced through diversity.

GESAC and its members look forward to cooperating with the services of the EC to give the desired impact to the current legal framework of the EU and to facilitate the needed licences for the use of authors and composers work by GAI models and services.