

Article 17 Stakeholder Dialogue input paper: Ensuring the protection of users' rights in the Article 17 implementation guidelines

The COMMUNIA International Association for the Public Domain is a participant in the European Commission's stakeholder dialogue on the implementation of Article 17 of the Copyright in the Digital Single Market (CDSM) Directive. Based on our participation in the stakeholder dialogue so far¹, we have developed a position on how the guidelines to be issued by the Commission can contribute to safeguarding the rights of users' sharing and accessing content via Online Content Sharing Service Providers (OCSSPs).

Our position, as set out in this document, focuses on three broad issues that must be addressed by the guidelines: Licensing, Transparency, and Procedural Safeguards of User Rights. The Annex contains a detailed, step-by-step proposal for implementing the safeguards necessary to ensure that the measures required by Article 17 do not violate fundamental rights and do not prevent the use of exceptions and limitations to copyright.

1. General observations

The discussions and presentations during the stakeholder dialogue have confirmed a number of important conditions that must be taken into account when implementing Article 17 of the CDSM Directive. These concern the capabilities of existing technologies for Automated Content Recognition (ACR), the availability of licenses and the accuracy of existing rights management systems. All of these insights must be factored in when issuing the guidelines.

Capabilities of ACR technology

Through a number of presentations, by technology vendors and platforms that have developed in-house rights management solutions, a clear picture about the capabilities and limitations of ACR technology has emerged². ACR technologies exist for the most relevant types of copyrighted works in the context of online platforms, although the majority of vendors are currently only offering solutions aimed at identifying audio and/or audiovisual content. ACR technologies are increasingly accurate and robust in matching content uploaded to online platforms to fingerprints (or hashes) of reference files provided by

¹ Reports from the stakeholder dialogue meetings can be found [on our website](#).

² This picture is largely identical with the findings of a study commissioned by the French Ministry for Culture that was conducted during the 2nd half of 2019 independent of the discussions at the stakeholder dialogue: "[Vers une application effective du droit d'auteur sur les plateformes numériques de partage: Etat de l'art et propositions sur les outils de reconnaissance des contenus](#)" (2020).

rightholders. Vendors are claiming the ability to reliably identify works based on very short snippets of content, and some vendors offer systems that can match content in (near) real time, allowing matching at upload time.

On the other hand, there are currently no technologies available in the market that analyse the context in which a use takes place. This makes these technologies incapable of automatically determining if a specific upload is lawful because it is covered by an exception or limitation to copyright.

While misidentifications (false positives or false negatives) appear to be relatively rare, these technologies rely on accurate ownership information. Inaccurate, fraudulent (false claims of rights ownership) or conflicting rights information is a major source of erroneous actions taken by ACR systems.

In sum, in their current state, ACR technologies are well suited for uses such as revenue accounting by platforms towards rightholders. However, ACR based systems are not suitable for fully automated blocking and/or removal of user uploads. While it is clear that some type of ACR will need to be part of the measures that OCSSPs have to implement in line with the obligations created by Article 17(4)b and c, it is also clear that the provisions laid down in Articles 17(5), 17(7) and 17(9) require that the use of ACR is accompanied by strong procedural safeguards.

Availability of licenses

One of the main objectives of Article 17 is to create the conditions to more effectively license OCSSPs to have publicly available on their platforms copyright-protected works and other subject matter uploaded by their users. Where copyright-relevant acts performed by the OCSSPs are authorised through licenses, OCSSPs are not required to take the preventive measures foreseen in Article 17(4)b and c. This means that, from a users' (rights) perspective, it is highly desirable to facilitate as broad as possible licensing of OCSSPs, as it ensures that there is less interference with uses made under copyright exceptions and with fundamental rights and freedoms³.

The stakeholder dialogue has made it clear that among different types of rightholders there are widely diverging perspectives on licensing, and that it will not be possible to assume that platforms can obtain licenses for the use of all works that can possibly be uploaded to platforms via voluntary forms of licensing⁴.

³ Note that licensing does not automatically ensure that exceptions and limitations are respected and, on the other hand, uses made under exceptions and limitations are not limited to licensed content. This means that it must be ensured that lawful uses (including uses in a for-profit context) are not made conditional on the OCSSPs having a license in place, or on the platform's terms and conditions. It must also be ensured that uses covered by an exception or limitation cannot be monetized by third party rightholders at the detriment of the ability of the uploaders to monetize them.

⁴ An approach to non-voluntary forms of licensing has been suggested by the German Federal Government in point 11 of its [statement issued in the Council on the occasion of the adoption of the Directive on 15 April 2019](#). So far the German Federal Government has not provided any concrete proposals in this direction.

The intention to license is largely sector and business model specific. While the music industry and the visual arts sector (including photography) can be expected to offer licenses for the use of their works, large parts of the audiovisual sector and the publishing sector have indicated that they do not intend to license the use of their works and that they intend to make use of the provisions in Article 17(4)b and c instead.

On the other hand, OCSSPs have indicated that they do not intend to acquire licenses for types of works that they consider secondary in the context of their services (for example photographic works on video sharing platforms), even if they are offered such licenses. Such a position would likely lead the affected rightholders to make use of the provisions in Article 17(4)b and c, with uncertain outcomes.

At this stage it is unclear what kind of licensing landscape will emerge once Article 17 is implemented. It is clear that some sectors will not issue licenses as they consider this threatens to undermine existing business models based on exclusive licensing. On the other hand, it is unclear how licensing relationships in sectors where rightholders have an incentive to license OCSSPs will be structured. Large commercial rightholders and the large platforms have expressed preferences for direct/individual forms of licensing. It is highly questionable if this model will scale down to smaller (EU based) platforms and smaller rightholders. To ensure that the implementation of Article 17 does not hurt smaller rightholders and platforms disproportionately, extended collective licenses or non-voluntary forms of licensing are needed in sectors where the required infrastructures exist⁵.

Another problem related to licensing is the general complexity of the licensing environment in the music sector with different types of rights and different modalities for licensing across different EU Member States. There is also a lack of clarity about the relationship between (blanket) licensing and the ability of rightholders to monetize user uploads based on the use of parts of their works in such uploads⁶.

Accuracy of blocking/removal actions

There is currently a lack of empirical evidence related to the functioning of existing rights management practices. So far all stakeholders have been selective in sharing information related to their own rights activities (rightholders) or patterns observed on their services (OCSSPs). Various rightholders' representatives have made unverifiable claims that takedowns and challenges to takedowns are very small in absolute and relative numbers. The representatives of platforms, in spite of being required to do so under Article 17(10) of the Directive and in spite of repeated requests by users' organisations in line with Article

⁵ There are also emerging models where third party technology providers aggregate direct licenses from rightholders as part of content recognition services (see for example [the presentation given by PEX during the third meeting of the stakeholder dialogue](#)).

⁶ While not directly in the scope of the stakeholder dialogue, the issue of demonetization (i.e the ability of rightholders to direct advertising revenues away from the uploading user to themselves) based on small snippets of included third party works, will likely become even more widespread once Article 17 is implemented and should therefore also be addressed at the legislative level.

17(10)⁷, have not shared any detailed information regarding the functioning of their practices, resorting to pointing to previously published information⁸. Nevertheless, it should be highlighted that platforms have made statements confirming some information observed by others that the majority of challenges to takedowns are resolved in favour of users⁹. In addition, earlier research on notice and takedown¹⁰ strongly suggests that most users do not challenge wrongful takedowns even when their content is likely legal.

This lack of empirical evidence is especially problematic since the European Commission does not have empirical data describing the scope and prevalence of disputed removals or blocks. To date only the French government has published independent data on the relative prevalence of copyright related blocking/removal actions¹¹. Based on a representative sample of French Internet users, the study finds that 4% of French internet users have had uploads blocked or taken down, that 56% of these have contested blocking orders and that 59% of these contestations have resulted in the content being reinstated. These findings indicate that content blocking/removal affects a sizable proportion of internet users and that substantial part of blocking/removal actions is issued wrongfully. While these numbers seem to contradict the (unverifiable) claims made by rightholders that the overall number of removal/blocking orders is small, it is possible to reconcile these two observations when taking into account that the French study looks at percentages of users while rightholder statements deal with the number of works taken down/blocked.

Wrongful removal/blocking actions can be the result of not taking the context of a use into account (acting based on a simple match), they can be the result of incorrect ownership information (claimants acting on works that they do not own either because they are in the public domain, openly licensed or owned by another rightholder) or they can be the result of abuse of the removal/blocking procedures (using copyright as a tool to take down content for other reasons).

Based on the available evidence¹², it is clear that unjustified or wrongful blocking/removal actions are a real problem that affects a substantial amount of internet users. This underlines the need to implement the user rights safeguards contained in Article 17 in a way that provides meaningful protection from unjustified removal and blocking actions. This needs to be a central element of the guidelines to be issued by the Commission.

⁷ See the [Request for information by users' rights organisation participating in the stakeholder dialogue](#) provided to Google and EDiMA on 07 January 2020.

⁸ See pages 18-32 of the "[How Google Fights Piracy report from November 2018](#)".

⁹ During the sixth meeting of the stakeholder dialogue Google has confirmed the observation made in the Hadopi study that 60% of all disputes over blocking/removals are ultimately resolved in favor of users.

¹⁰ As [presented by the Lumen database](#) at the fourth meeting of the stakeholder dialogue.

¹¹ See "[Vers une application effective du droit d'auteur sur les plateformes numériques de partage: Etat de l'art et propositions sur les outils de reconnaissance des contenus](#)" (2020) page 92-102.

¹² As explained, the empirical basis is extremely limited at this point. From a good governance perspective the European Commission should insist on platforms providing more data on the nature and scope of copyright-related removal/blocking actions and disputes triggered by such actions before it issues its guidelines.

To effectively deter wrongful ownership claims, repeated wrongful ownership claims should lead to exclusion of the claimants from the ACR based enforcement mechanisms.

2. Principles for the Article 17 implementation guidelines

Based on the discussions at the stakeholder dialogue, our own analysis of Article 17 and in line with the [recommendations from European Academics on Safeguarding User Freedoms in Implementing Article 17](#), the European Commission must take the following principles into account when developing its guidelines for the implementation of Article 17. In light of the need to prevent further fragmentation of the copyright rules in the EU these guidelines should have a binding character on the Member States, OCSSPs and rightholders.

Licensing

In sectors where rightholders have an incentive to license OCSSPs (e.g. music sector), national lawmakers should be recommended to fully explore legal mechanisms for granting OCSSPs authorization to have in their platforms copyright-protected works and other subject matter uploaded by their users. These mechanisms include collective licensing with extended effect, mandatory collective management schemes, and legal licenses¹³.

Facilitating a broad licensing of OCSSPs not only ensures that there is less interference with user rights (as it reduces the application of the preventive measures foreseen in Article 17(4)b and c), but it also guarantees that smaller platforms are able to obtain authorization and that smaller rightholders are able to benefit from Article 17(1).

Transparency

In addition to the provisions laid down in Article 17(8) of the Directive that deal with transparency from OCSSPs towards rightholders, there is a need for transparency measures ensuring that users and the general public can scrutinize the functioning of the measures introduced by Article 17(4)b and c.

In general, any measures implemented by OCSSPs subsequent to Article 17 must be implemented in as transparent a manner as possible. Most importantly, **all ownership claims must be made transparent to allow public scrutiny**. In order to prevent unjustified removals or blocking by rightholders claiming ownership of works that they do not own, blocking/removal actions must be limited to works with publicly available ownership information. In addition, ownership claims must be checked against a public database of public domain and publicly licensed works¹⁴.

¹³ Mechanisms, regulated by law, that enable a certain copyright use absent authorization of authors and subject to the payment of remuneration or compensation, and that have an effect on the nature of the exclusive right. Legal licenses include statutory licenses (mechanism that restricts the nature of an existing exclusive right through the introduction of a copyright exception or limitation to that right, subject to compensation) and compulsory licenses (mechanism that does not usually regulate an existing exclusive right; rather, it's imposed *ab initio* to govern a new type of use via a standalone remuneration right).

¹⁴ Such a database (or federation of databases) could be operated (or coordinated) by the EUIPO.

In addition, there is a clear need for transparency on the impact of blocking/removal actions. **OCSSPs must be required to publish statistical information on the number of such actions as well as the number of complaints and the resolution of complaints.**

Furthermore, the decisions resulting from in-platform complaint and redress procedures must be made public to allow consumer organizations to react to such decisions and represent consumer interests in subsequent out-of-court redress mechanisms and in court.

Procedural Safeguards for User Rights

Article 17 of the Directive establishes a balance between the measures intended to improve the licensing of user-uploaded works by OCSSPs, on the one hand, and user rights, on the other hand. In order to guarantee the effective protection of user' rights, the procedural user rights safeguards laid down in Article 17(9) must be implemented in a way that takes into account the fundamental inability of ACR systems to recognize legitimate uses of copyright-protected works and other subject matter. All measures involving automated content recognition, implemented by OCSSPs to limit their liability for the use of unauthorized works, need to meet the following standards:

1. In cases other than prima facie infringement, uploaders *must* have the ability to override ACR based actions before the blocking/removal takes effect, to prevent automated measures from affecting lawful uses. Such an override should be considered a complaint.
2. In prima facie infringement cases, uploaded content can be automatically blocked/removed as long as uploaders have the ability to challenge the ACR based actions afterwards.
3. Users must be able to rely on **all** existing exceptions as grounds for challenging an action and must be able to dispute the ownership claims on which an action is based.

In the above context, prima facie infringement can be assumed for the following types of matches: (1) exact matches (exact copy of the work)¹⁵, (2) partial matches (upload contains a part of the original work and nothing else)¹⁶, and (3) all matches of pre-release works.

The following types of matches **cannot** be assumed to be prima facie infringement: (1) exact or partial matches with context (the work or parts of the work only constitute a part of the upload), and (2) matches of indivisible works (e.g. photographs), short works (e.g. short poems) and very short excerpts (e.g. memes, reaction gifs) of any works, even when they are without context¹⁷, provided that they are not pre-release works.

¹⁵ Including non-creative alterations made to evade detection by ACR systems.

¹⁶ Idem.

¹⁷ The exclusion of such matches from the prima facie infringement qualification takes into account the fact that the context for the use of those categories of works or excerpts of works is often derived not from uploaded work itself but from the accompanying post.

3. Commission Guidelines

We urge the Commission to take these principles into account when drafting its guidelines. The stakeholder dialogue has confirmed the fact that ACR technologies are not capable of recognizing lawful uses of copyrighted works. It is also clear, both from the amounts of user uploads that take place on OCSSPs and in light of the existing (unregulated) use of such technologies to block/remove user uploads, that many OCSSPs will not be able to meet their obligations under Article 17 without relying on ACR technologies.

To reconcile the use of ACR technologies to prevent the upload of unauthorised works with the requirement that such measures shall in no way affect legitimate uses, it is imperative that users have the ability to prevent lawful uploads from being blocked/removed. The Commission guidelines should provide instructions on how OCSSPs can reconcile these conflicting legislative objectives in practice. In the Appendix we provide a 14 step outline for implementing Article 17 in a way that balances users rights and the interests of different types of rightholders.

Annex 1: Implementation Outline

1. OCSSPs have to make best efforts to license works uploaded by their users.
 - OCSSPs must seek licenses from representative collecting societies for categories of works that have a substantial presence on their platform.
 - OCSSPs must respond to licensing offers from all rightholders who can show substantial presence on the OCSSP.
 - Unless non-voluntary collective license schemes are in place, rightholders do not have to issue licenses.
2. If ACR systems are used to identify content on the platform, all ownership claims that are made via these systems must be made available via a [single] public database. Rightholders that wilfully make wrongful ownership claims shall be sanctioned.
3. If ACR systems are used to identify content on the platform, the ACR system must check against a [single] public database of Public Domain and freely licensed content.
4. Matches that qualify as *prima facie infringement* can be automatically blocked/removed or monetised by the rightholder without further human intervention.
 - Matches that qualify as *prima facie infringement*: (1) exact matches (exact copy of the work), (2) partial matches (upload contains a part of the original work and nothing else), and (3) all matches of pre-release works.
 - Matches that do not qualify as *prima facie infringement*: (1) matches with context (the work or parts of the work only constitute a part of the upload), and (2) matches of indivisible works (e.g. photographs), short works (e.g. short poems) and very short excerpts (e.g. memes, reaction gifs) of any works, even when they are without context, provided that they are not pre-release works.
 - The definition of *prima facie infringement* can evolve based on lessons learned during use (in particular on the number of successfully challenged automated blocks/removals).
5. Uploaders must have the ability to contest such actions ex-post. For this purpose OCSSPs must provide uploaders with a user friendly, easily accessible form to contest the ACR based action.
 - The way to challenge will be dependent on the setup and technical capabilities of the platform. At the minimum users must be given the ability to dispute the ownership claim and/or claim that the use falls under one of the two exceptions identified in Article 17(7). It must also be possible to invoke any other exception that is implemented in the relevant Member State.

6. If the uploader does not contest the action then the OCSSP is allowed to maintain the automatic action that was originally specified.
7. If the uploader contests the action then the rightholder has a maximum of two business days¹⁸ to respond. If there is no reaction from the rightholder, the OCSSP is not allowed to maintain the automatic action that was originally specified. → **Step 11**
8. For all other matches content cannot be automatically blocked/removed or monetised by the rightholder without first giving the uploader the ability to contest the ACR based action. This should occur at the earliest possible time.
9. If the uploader does not contest the action then the OCSSP is allowed to carry out the automatic action (block/remove or monetise) that was originally specified.
10. If the uploader contests the action then the OCSSP is not allowed to carry out the automatic action that was originally specified. The content is uploaded or the uploaded content is maintained, and the rightholder has a maximum 10 business days to respond. If there is no reaction from the rightholder, the OCSSP is not allowed to carry out the automatic action that was originally specified.
11. If the rightholder responds to an uploader's complaint and requests the OCSSP to maintain the original action, it has to provide a justification why the user complaint is not valid. If the rightholder considers a use for which an uploader has contested a blocking/removal action **prima facie** infringing, even though it was not automatically qualified as such, then the rightholder can also instruct the OCSSP to take the upload down until the dispute is resolved. Rightholders that misuse the mechanism mentioned in the preceding sentence shall be sanctioned.
12. Once the rightholder's response has been received by the OCSSP, the OCSSP (or an entity designated by the OCSSP for this purpose) has 10 business days to review the dispute and make a decision.
13. OCSSPs must regularly publish statistics on the number of actions (block/remove or monetise) and subsequent complaints received and the outcome of complaints.
14. In order to allow other interested stakeholders to assess the fairness of the decisions and to allow consumer organizations to represent consumer interests in subsequent out-of-court redress mechanisms and in court, the in-platform decisions must be made public.

¹⁸ Note that all reaction deadlines in this outline are indicative at this moment. Final deadlines should be established after an assessment of the required business processes.