

April 6, 2020

Article 17 Stakeholder Dialogue: EFF additional comments on privacy concerns and filter test suites

Dear Director Abbamonte,
Dear Head of Unit Giorello,
Dear EC copyright stakeholder dialogue team,

We hope that you are keeping well in this difficult time.

We welcome the Commission's commitment to ensuring continuous consultation with stakeholders before adopting guidance on the application of Art 17 C-DSM. In this spirit, I am writing to you on behalf of EFF, the Electronic Frontier foundation, to draw your attention to important aspects of the Copyright Directive, which should be addressed in any future guidance document.

The Electronic Frontier Foundation is among the leading nonprofit organizations defending civil liberties in the digital world. Together with many other civil society organisations, we have stressed that the implementation guidelines should focus on user rights, specifically free speech, and limit the use of automated filtering, which is notoriously inaccurate. We also stressed that the guidelines must ensure that legitimate uses of copyrighted material should take precedence over content blocking measures Internet service providers employ to comply with Art 17.

Whilst these aspects have been discussed during the past stakeholder meetings, we would like to substantiate two further issues, which have not yet received the attention they deserve.

1. Upload Filter and Article 22 GDPR

There is consensus among stakeholders that automated systems for catching and blocking copyright infringement will have a significant impact on users, who will sometimes find their legitimate posts erroneously removed or blocked. However, under Article 22 of the GDPR, users have a right “not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.” Save for exceptions, this provision protects users from detrimental decisions made by algorithms, such as being turned down for an online loan by a service that uses software, not humans, to accept or reject applicants.

In a recent [blog post](#)¹, we have articulated our arguments on why automatic filters fall within the scope of the GDPR and why filters will often result in legal or significant effects as envisioned under Art 22 GDPR. It is highly doubtful whether online service providers will be able to rely on legitimate grounds for automated individual decision-making.

We conclude that the complex and problematic relationship between Art 17 C-DSM and Art 22 GDPR should urge national lawmakers to exercise legislative self-restraint. By the same token, we urge the Commission to take this aspect into account when drafting the guidance document.

2. Filter Test-Suites

In another [recent publication](#)², we have approached Art 17 from a technical perspective. As EU member states move to "transpose" the Directive by turning it into national laws, they will need to evaluate claims from tech companies that have developed their own internal filters (such as YouTube's Content ID filter) or that are hoping to sell filters to online services that will assist in complying with the Directive's two requirements:

1. To block copyright infringement; and
2. To not block user-submitted materials that do not infringe copyright, including materials that take advantage of the mandatory exceptions in 17(7).

Evaluating the performance of these filters will present a major technical challenge, but it's not an unprecedented one. Law and regulation are no stranger to technical performance standards. Regulators routinely create standardized test suites to evaluate manufacturers' compliance with regulation, and these test suites are maintained and updated based on changes to rules and in response to industry conduct. Test suites are the standard way for evaluating and benchmarking technical systems, and they provide assurances to consumers that the systems they entrust will perform as advertised. Reviewers maintain standard suites for testing the performance of code libraries, computers and subcomponents (such as mass-storage devices and video-cards) and protocols and products, such as 3D graphics rendering programs.

We believe that the EU's guidance to Member States on the Art 17 implementation should include a recommendation to create and maintain test suites if member states decide to establish copyright filters. These suites should evaluate both the filters' ability to correctly identify infringing materials and non-infringing uses. Filters should not be approved for use unless they can meet this challenge.

¹ <https://www.eff.org/deeplinks/2020/02/upload-filters-are-odds-gdpr>.

² <https://www.eff.org/deeplinks/2020/02/europeans-deserve-have-their-governments-test-not-trust-filters>.

Many thanks for taking our concerns into account for the drafting of the guidance. We remain at your disposal for any questions you may have.

Best regards,

Dr. Christoph Schmon
International Policy Director
Electronic Frontier Foundation