

June 25, 2020

EFF comments to the Copyright Draft Implementation Bill: Article 17 C-DSM

Dear Members of Parliament,

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

I am writing to you on behalf of EFF, the Electronic Frontier foundation, to draw your attention to important aspects of Article 17 of the EU Copyright Directive (C-DSM) that should be considered when working on the Draft Implementation Bill that was recently sent to the House of Representatives.

The Electronic Frontier Foundation is among the leading nonprofit organizations defending civil liberties in the digital world. Together with many other civil society organizations, we have stressed at numerous occasions why Art 17 of the EU Copyright Directive has the potential to turn online services into copyright police with special license to scan and filter billions of users' social media posts and videos, audio clips, and photos for potential infringements.¹

In light of the user-focused comments by the NL government during the legislative process at EU level, we urge you to have again the interest of users and freedom of speech in mind when working on the implementation of the Directive, rather than solidifying the dominance of big tech platforms that already exist.

We would like to briefly draw your attention to some important elements that should accompany a user-centered reform of Copyright legislation.

Complaint and redress mechanisms are not good enough to protect users' free expression rights

Fundamental rights protection must be protected ex ante at the moment users post or upload content, and not be shifted to the complaint stage after legitimate content has been taken down. Everyone has the right to freedom of expression without interference by filtering technologies that are not able to perform context-sensitive interpretations. There is enough legislative leeway to make sure, as Art 17(7) of the C-DSM sets out, to make

¹ <https://www.eff.org/deeplinks/2019/03/european-copyright-directive-what-it-and-why-has-it-drawn-more-controversy-any>.

sure that the cooperation between online content-sharing service providers and rightholders does not prevent the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights. It would have a severe chilling effect if users were left with a complaint-procedure, which many users are unlikely to use.

Make sure that user rights and exceptions are transposed

Art 17(7) is a key provision to safeguard user rights. We urge you to make sure that users are able to rely the exceptions or anchored in the Directive, i.e. (a) quotation, criticism, review and (b) use for the purpose of caricature, parody or pastiche. We also urge you to make sure that the implementing legislation does not affect legitimate uses (Art 17(9)).

Transpose the ban of general monitoring

It is an explicit requirement under Art 17(8) of the C-DSM that the obligations established in the Directive should not lead to Member States imposing a general monitoring obligation. We urge you to make sure that this requirement is transposed into Dutch law.

Upload Filter and Article 22 GDPR

There is consensus 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](#)², 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 you to take this aspect into account when implementing the C-DSM.

Best regards,

² <https://www.eff.org/deeplinks/2020/02/upload-filters-are-odds-gdpr>.

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