

Stakeholder dialogue pursuant to Article 17 of the Directive on Copyright in the Digital Single Market

Discussion paper for the meetings of 16 January and 10 February 2020

The four stakeholder dialogue meetings held on 15 October, 5 November, 25 November and 16 December 2019 allowed us to gather an overview of the current market situation as regards licensing practices, tools used for online content management – as relevant for Article 17 – and related issues and concerns. While presenting their current practices and experiences, stakeholders also brought up a number of pertinent topics for discussion on what could be best practices for the future application of Article 17.

As of the meeting of 16 January 2020, the services of the Commission would like to enter the third phase of the stakeholder dialogue and focus on the practical application of Article 17.

The objective is to gather evidence, views and suggestions that the services of the Commission can take into account in preparing the guidance pursuant to Article 17(10).

This document includes questions prepared by the services of the Commission with the objective of structuring the discussions at the next stakeholder meetings. The questions are grouped into six main topics and cover the main issues raised in the dialogue so far. Stakeholders should feel free to raise additional issues, which they consider relevant for the application of Article 17.

These questions are meant to facilitate the discussions at the stakeholder meetings. Therefore, we do not explicitly need stakeholders to reply to us in writing.

We propose to hold the discussions at the next two meetings as follows:

- **16 January meeting**: topic 1 (authorisations and ‘best efforts’ to obtain an authorisation), topic 2 (‘best efforts’ to avoid unauthorised content) and topic 3 (notices submitted by rightholders to remove unauthorised content);
- **10 February meeting**: topic 4 (safeguards for legitimate uses of content), topic 5 (redress mechanism for users) and topic 6 (information to rightholders).

Additional meetings may be organised, in particular if there is a need to revisit certain of the topics outlined in this document. The services of the Commission are also open to add other topics of importance to stakeholders to the discussions. They may also decide to put forward further questions in addition to those laid down in this document.

1. AUTHORISATIONS AND ‘BEST EFFORTS’ TO OBTAIN AN AUTHORISATION (Art. 17 (1-3) and (4)(A))

Background

Article 17(1-3) provides that online content-sharing service providers perform an act of communication to the public and therefore need to obtain an authorisation from relevant rightholders for the use of their content. The authorisation also needs to cover the uses carried out by users of online content-sharing services under certain conditions.

Article 17(4) establishes a specific liability regime for cases where no authorisation is obtained. This allows services to avoid liability for unauthorised uses of content under certain conditions. The first condition, laid down in letter (a) of paragraph 4, is that the service providers demonstrate that they have made their best efforts to obtain an authorisation, but could not obtain it.

At previous stakeholder dialogue meetings, stakeholders pointed out that the number of rightholders for the content uploaded on online content-sharing services can be very high, given the diversity and amount of content that users potentially upload. Stakeholders also explained that current licensing practices differ depending on the type of rightholders and on the type of content. Several stakeholders requested clarity as to what ‘best effort’ to obtain an authorisation means in practice, including in the light of the principle of proportionality laid down in Article 17(5).

Questions for discussion during the next meetings:

Stakeholders are invited to contribute to the discussion on the basis of the questions below and to be as precise and concrete as possible. When applicable, they should focus in particular on their specific market situations and areas of activity.

1.1. In your view, how could the system of authorisations set out in Article 17(1 to 3) work in practice in the different sectors?

1.2. Taking into account the proportionality criteria referred to in Article 17(5) (size of the service, type of content, cost of technologies etc.), what do you think could be concretely expected from service providers as ‘best efforts’ to obtain an authorisation under Article 17(4)(a)?

2. ‘BEST EFFORTS’ TO AVOID UNAUTHORISED CONTENT (Art. 17(4)(b))

Background

Under Article 17(4)(b), the second condition for service providers to avoid liability in the absence of rightholder’s authorisation is to demonstrate that they have made their best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided them with the relevant and necessary information.

Discussions at the previous meetings showed that a variety of methods and technologies are applied today for content identification and management on online content-sharing services.

Stakeholders who intervened highlighted the benefits, challenges and limitations of each of these methods and technologies, and also explained what type of information is provided today by rightholders to online content-sharing service providers.

Some stakeholders, in particular online content-sharing service providers, also underlined the need to allow different solutions, taking into account, among other things, the size of the services and the types of content that they make available.

Both service providers and rightholders brought up the issue of costs and resources to be deployed for content identification tools and methods, in particular where different solutions are used. Several stakeholders called for common formats and standards. The need for accurate information on rights was also mentioned by a number of participants, in particular by online content-sharing service providers and users' organisations.

Questions for discussion:

Stakeholders are invited to contribute to the discussion on the basis of the questions below and to be as precise and concrete as possible. When applicable, they should focus in particular on their specific market situations and areas of activity.

2.1. Taking into account the proportionality criteria referred to in Article 17(5) (size of the service, type of content, cost of technologies etc.) and relevant industry standards, what do you think could be concretely expected from service providers as 'best efforts' to avoid the availability of unauthorised content on their service under Article 17(4)(b)?

2.2. What 'relevant and necessary' information do you think rightholders should concretely provide to service providers under Article 17(4)(b) so that they can make their 'best efforts' to avoid availability of unauthorised content?

3. NOTICES SUBMITTED BY Rightholders TO REMOVE UNAUTHORISED CONTENT (Art. 17(4)(c), first part)

Background

The third condition for service providers to avoid liability in the absence of rightholder authorisation is to demonstrate that they have acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and that they have made best efforts to prevent their future uploads (in accordance with Article 17(4)(b)).

The information contained in notices that rightholders send to online content-sharing service providers is the basis for the action taken by the latter to disable access to, or remove unauthorised content. At previous meetings some stakeholders have indicated the need to have more clarity as to what type of information the notice by rightholders should contain to be sufficiently substantiated and to allow appropriate processing.

Question for discussion:

Stakeholders are invited to contribute to the discussion on the basis of the question below and to be as precise and concrete as possible. When applicable, they should focus in particular on their specific market situations and areas of activity.

3.1. In your view, what type of information should a ‘sufficiently substantiated’ notice sent by rightholders contain in order to allow the service to act expeditiously?

4. SAFEGUARDS FOR LEGITIMATE USES OF CONTENT (Art. 17(7))

Background

Under Article 17(7), legitimate uses, which do not require the authorisation of relevant rightholders, include uses under an exception or limitation to copyright and related rights, uploads of content in which a user holds all the relevant rights, or uses of works in the public domain.

At previous meetings, some stakeholders, in particular users’ organisations underlined the need to make sure that content legitimately used is not blocked, including when this content is uploaded under exceptions and limitations to copyright. These stakeholders also highlighted the need to elaborate solutions to prevent or reduce abusive claims (typically when a claimant does not actually hold the rights). They also brought up the importance of ensuring reliable rights information. Some stakeholders also said that technologies used today have major limitations with regard to the recognition of legitimate uses, including uses under copyright exceptions and limitations.

Question for discussion:

Stakeholders are invited to contribute to the discussion on the basis of the question below and to be as precise and concrete as possible. When applicable, they should focus in particular on their specific market situations and areas of activity.

4.1. In your view, what should be done in practice to avoid that the cooperation between rightholders and service providers leads to the unavailability of legitimate content?

5. REDRESS MECHANISM FOR USERS (Art. 17(9))

Background

As discussed at previous meetings, disputes can occur when content sharing service providers disable or remove access to user uploaded content, for example when users consider their upload to be covered by an exception or limitation to copyright. Article 17 requires online content-sharing services to put in place a redress mechanism allowing users to challenge the blocking or removal of the content they uploaded.

At previous meetings service providers explained how they currently deal with users' complaints when their content is blocked or removed and what happens with the content while the dispute is ongoing. Users' organisations were of the view that so far users do not complain to a significant extent due to the complexity of the procedures and fear of legal action. These stakeholders stressed the need for a streamlined complaint and redress mechanism. They also considered that more transparency was needed as regards the content that is blocked or removed, as well as on the data stored by online content-sharing service providers.

Questions for discussion:

Stakeholders are invited to contribute to the discussion on the basis of the questions below and to be as precise and concrete as possible. When applicable, they should focus in particular on their specific market situations and areas of activity.

5.1. How do you think the redress mechanism under Article 17(9) should function in practice? In your opinion, what features should the redress mechanism have to be effective and expeditious?

6. INFORMATION TO RIGHTHOLDERS (Art. 17(8))

Background

Under Article 17(8), online content-sharing service providers need to provide rightholders, at their request, with information on the functioning of the tools used for ensuring the unavailability of content, without having to disclose any business secrets. Where they conclude agreements with rightholders, the service providers also need to provide them with information on the use of their content, without having to provide rightholders with detailed and individualised information for each work of other subject matter identified (recital 68).

At previous meetings, rightholders underlined the need for transparency on the use of technology and monetisation policies by online content-sharing service providers. The service providers asked for more clarity as to what type of information they need to provide to rightholders.

Questions for discussion:

Stakeholders are invited to contribute to the discussion on the basis of the questions below and to be as precise and concrete as possible. When applicable, they should focus in particular on their specific market situations and areas of activity.

6.1. In your view, what type of information under Article 17(8) should the online content-sharing service providers make available to rightholders? How detailed should this information be?