



> January 2020

EU Copyright Stakeholder Dialogue

Studio71 Presentation

Agenda.



> **Recap: Goals of article 17 legislation**



> Protecting rightsholders



> Protecting user freedoms



> A possible way forward

Recap: Why we are, where we are today...

> Article 17 is trying to re-balance a number of legitimate and sometimes competing interests

Typical interest

> Platforms

- > Want to **continue to grow** their platform business (typically advertising funded)
- > Want to **provide a safe place for users** to create and consume content

> Rightsholders

- > Want to **maintain exclusivity or maximum control** over the use and distribution of their content (including moral rights)
- > Want to **maximize monetization** of their rights

> Users

- > Want to **enjoy the widest possible range of content**
- > Want to be able to **create content** with minimum restrictions

What does Article 17 actually say

- › Article 17 has two closely linked elements: Protection of rightsholders and protection of users

Article 17 (1-4)

- › **OCSSP perform an act of communication to the public**
- › OCSSPs need to acquire authorization to make available copyrighted works
- › OCSSPs not liable, if they demonstrate that they
 - Have made best efforts to obtain authorization
 - Are working to ensure unavailability of unauthorized works for which rightholders have provided the necessary information/footprint
 - Implement take-down and stay-down procedures

Stakeholder Dialogue so far has mainly focused on enforcement mechanisms

Article 17 (7-9)

- › OCSSPs shall not (over-) block content in the public domain or uses permitted under existing exemptions (in particular quotation, criticism, review, caricature, parody or pastiche, but also including exceptions in Art. 5 Infosoc-Directive to assert uses permitted by law in the respective member state¹)
- › OCSSPs need to provide effective and expeditious redress mechanisms for users in the events of disputes
- › **Directive shall in no way affect legitimate uses**
- › No general monitoring obligations for OCSSPs

Equally important in the implementation of article 17

¹ As per Article 17 (9) the “Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”

What can go wrong?

- › Both too little and too much protection can have harmful consequences

Too much protection

- › Blocking of uploaded content despite existing license
 - TV broadcaster has secured rights to use certain pieces of music in a show; however, scanning filters do not know about such a license and block content
- › Permitted uses blocked
 - Online creator reviews and quotes copyrighted election campaign videos; however, videos get blocked
- › Legal risks and subsequent over-filtering make OCSSPs unattractive for users (e.g., lengthy manual reviews of all uploads) leading to a loss of variety
- › Scanning of very short audio or video snippets leads to false positives due to technical restraints
 - Piano concert of work in the public domain that shows 3-4 second match with protected audio recording

Too little protection

- › Filters do not detect unauthorized use of music in videos shared online leading to lost revenues for authors and labels
- › Copyrighted images are widely shared on Influencer accounts for commercial gain
- › Large parts of TV shows or movies are made available online with little or no monetization for rightsholders
- › Filters don't capture unauthorized use of audio recordings used in conjunction with hate speech (violating moral rights)

Agenda.



> Recap: Goals of article 17 legislation



> **Protecting rightsholders**



> Protecting user freedoms



> A possible way forward

Protecting Rightsholders

- > We need ALL OCSSPs to step up their game to protect content

Potential implementation

- > **Make best efforts to obtain authorisation from rightsholders**
- > **Introduce automated filtering per platform**
- > **Trusted Uploaders & Trusted Flaggers**
- > **Implement stay-down mechanisms for clear violations**

What this means

- > Active outreach and negotiations with most relevant rightsholders (e.g., major labels and collecting societies for music; TV broadcasters and movie studios for audiovisual etc.)
- > Public invitation for all other rightsholders to enter into individual negotiations
- > Identifying every possible rightsholder might be prohibitive or even impossible in the case of audiovisual content, no one-stop-shop
- > In line with Article 17 (5a; proportionality), focus automated filter requirements on content types that are regularly exploited on the respective platform. **Many platforms do not do this today.**
- > Notice and take-down for other types of content
- > Ensure filter mechanisms are available to all legitimate rightsholders (but enforce quality criteria to avoid bad actors from illegitimately blocking or monetizing content) and privilege content providers that can be expected to perform diligent rights clearing
- > Providers need to make sure that clear rights violations cannot be re-uploaded (paragraph 4c). This is not the case today.

Agenda.



> Recap: Goals of article 17 legislation



> Protecting rightsholders



> **Protecting user freedoms**



> A possible way forward

Protecting user rights and freedoms

- › Platforms need to make sure to effectively protect user rights and freedoms

Potential implementation

- › **Limit upfront filtering to obvious (prima facie) copyright infringement, e.g. full episode of TV-Series**

- › **Preflagging procedure and swift dispute mechanisms**

What this means

- › Automated blocking of uploads only for content identical (or equivalent) to provided reference files; pre-filtering and blocking of unclear cases not proportionate.
- › Uploaders still entitled to the safeguards of Article 17 (9)

- › If content partially matches reference files but is not an identical or equivalent copy, OCSSPs should implement a multi-stage process for dispute resolution

Protecting user rights and freedoms

> Platforms need to make sure to effectively protect user rights and freedoms¹

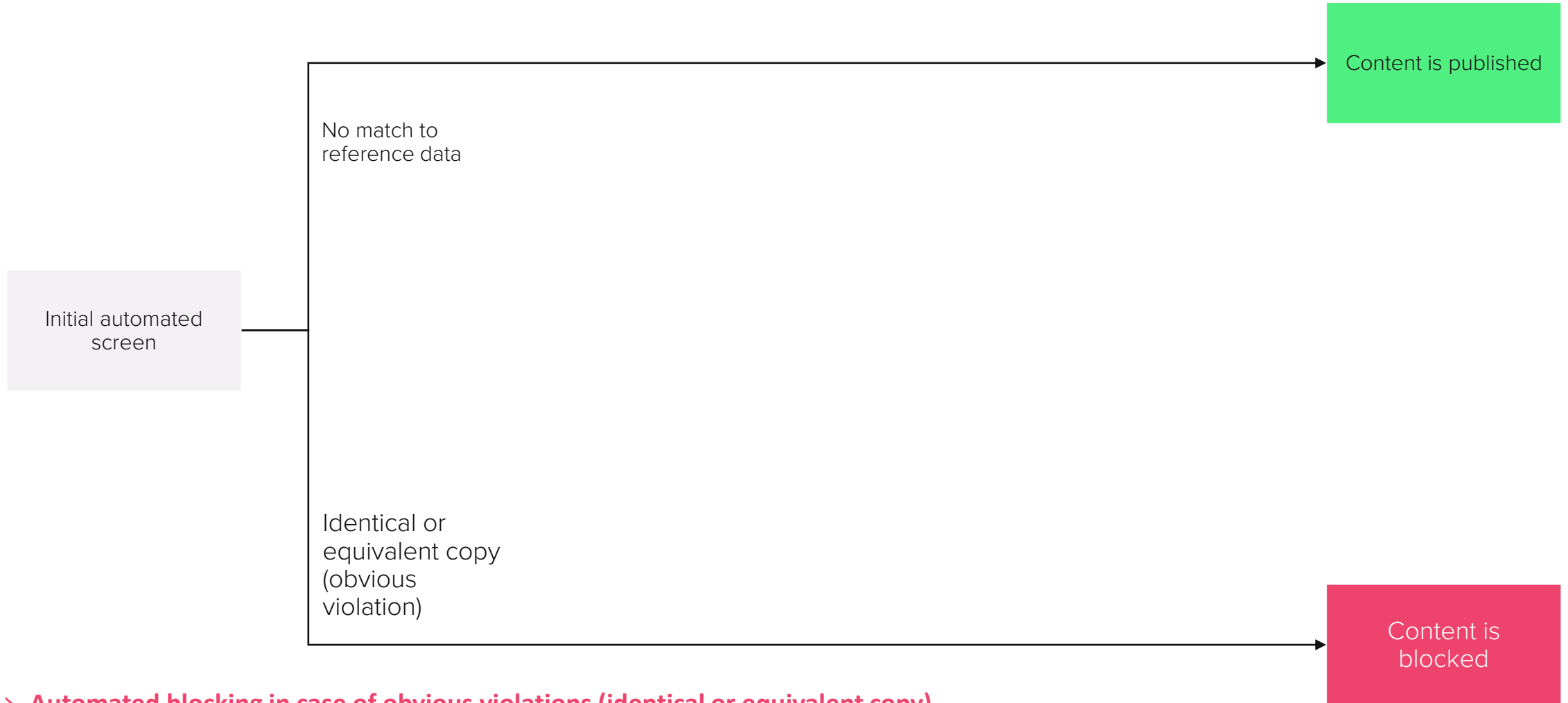


> **Non-infringing (or licensed) content published immediately**

¹ Note that this process is based on „Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics”

Protecting user rights and freedoms

- > Platforms need to make sure to effectively protect user rights and freedoms



- > **Automated blocking in case of obvious violations (identical or equivalent copy)**
- > **This process does not prevent contractual arrangements like revenue claiming instead of content blocking**

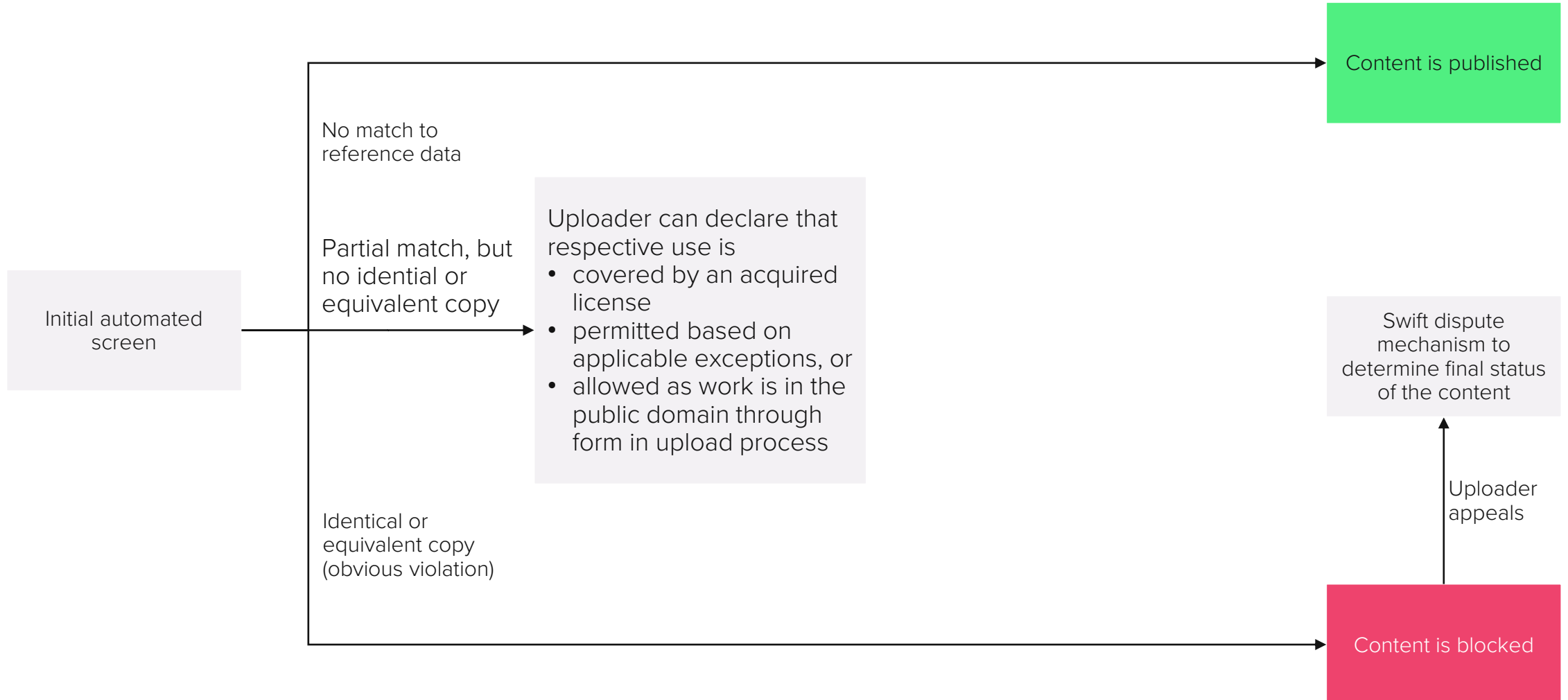
Protecting user rights and freedoms

> Platforms need to make sure to effectively protect user rights and freedoms



Protecting user rights and freedoms

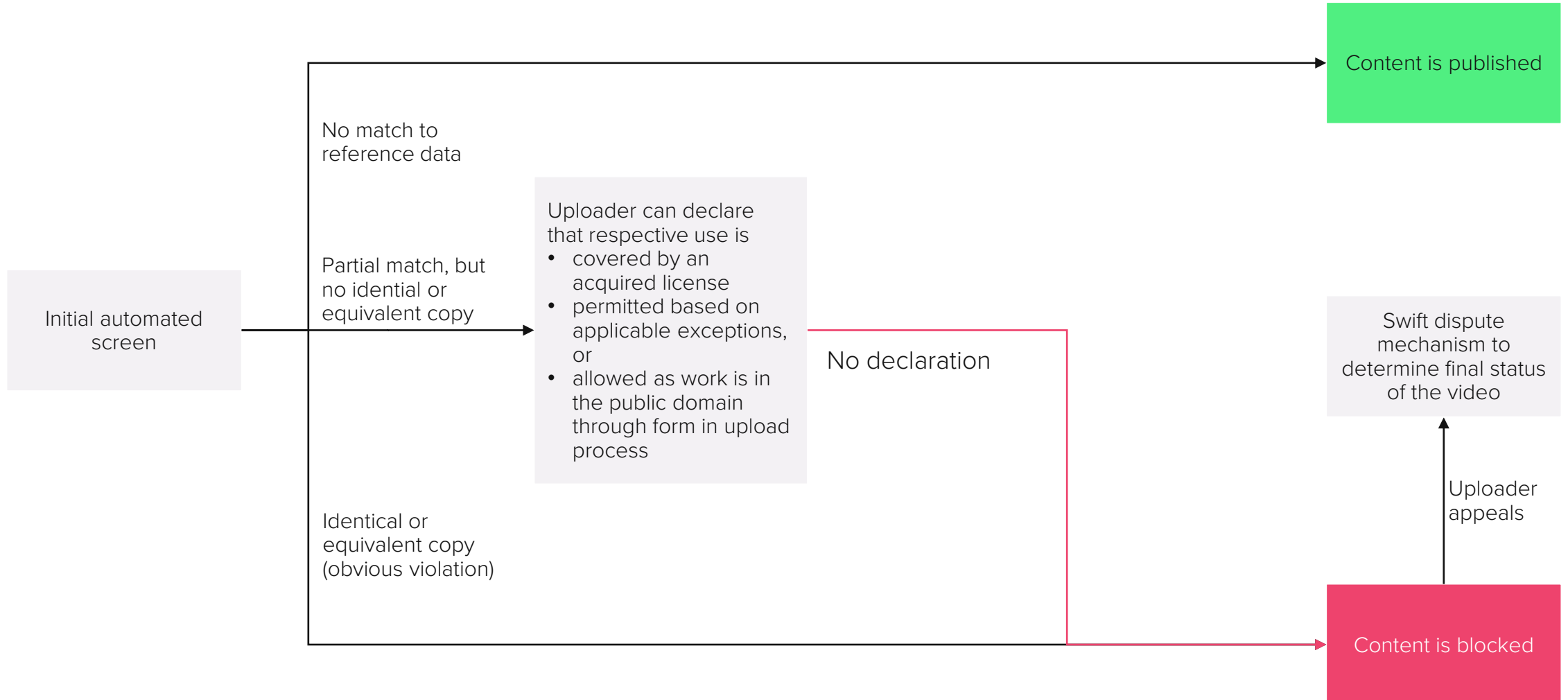
> Platforms need to make sure to effectively protect user rights and freedoms



> Dispute mechanism to protect user rights (paragraph 9 protection) in case filter incorrectly identifies violation

Protecting user rights and freedoms

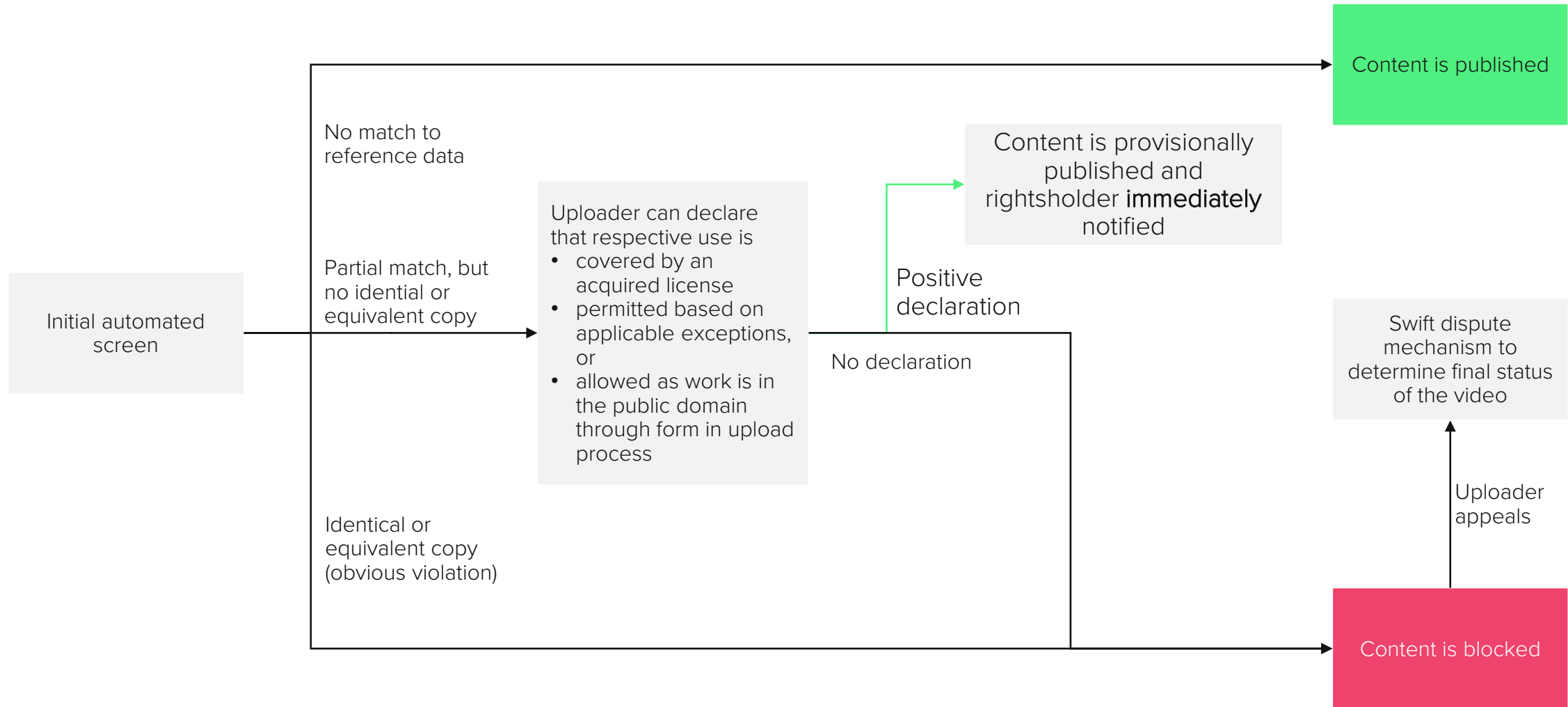
> Platforms need to make sure to effectively protect user rights and freedoms



> If user does not active declare permitted use, content is blocked

Protecting user rights and freedoms

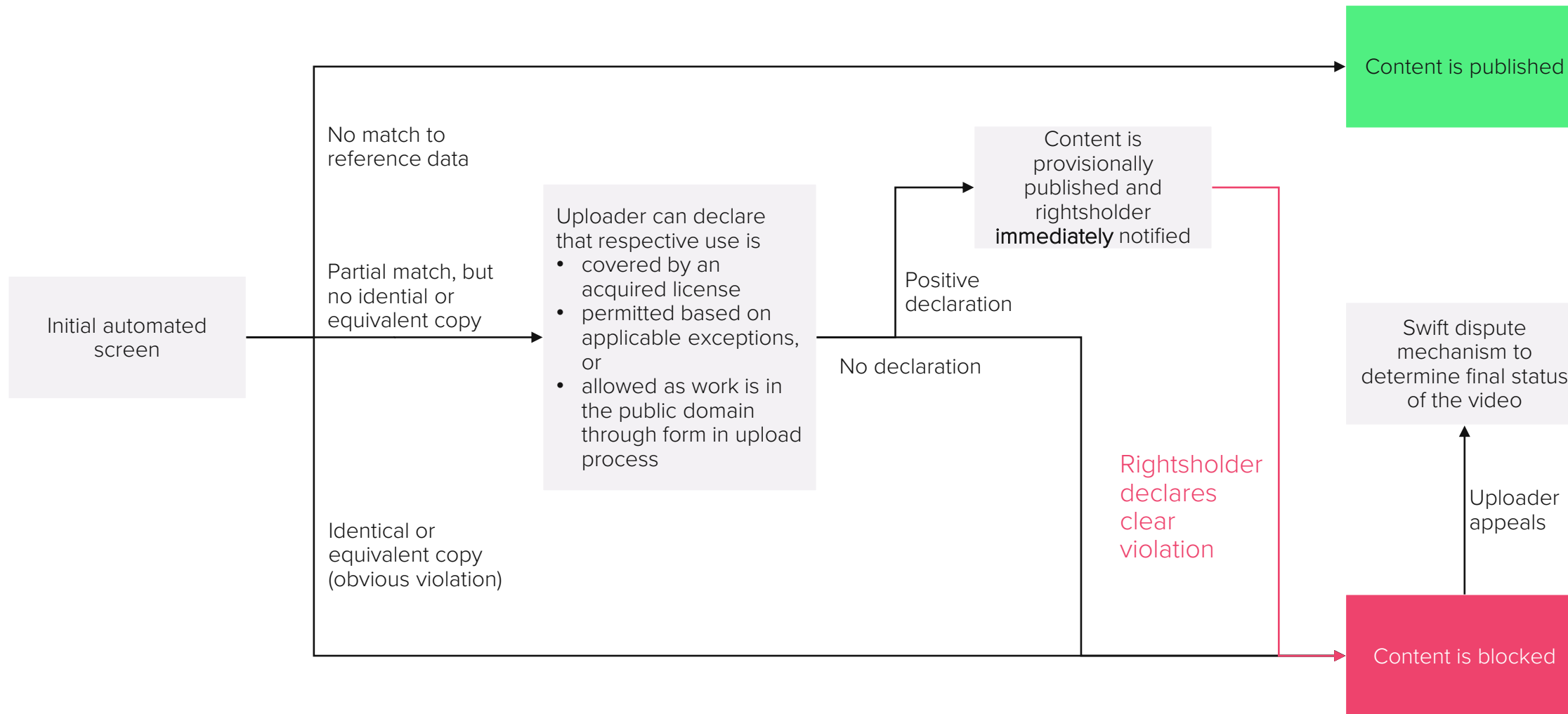
> Platforms need to make sure to effectively protect user rights and freedoms



> If user claims permitted use, rightsholder receives immediate notification allowing a swift response

Protecting user rights and freedoms

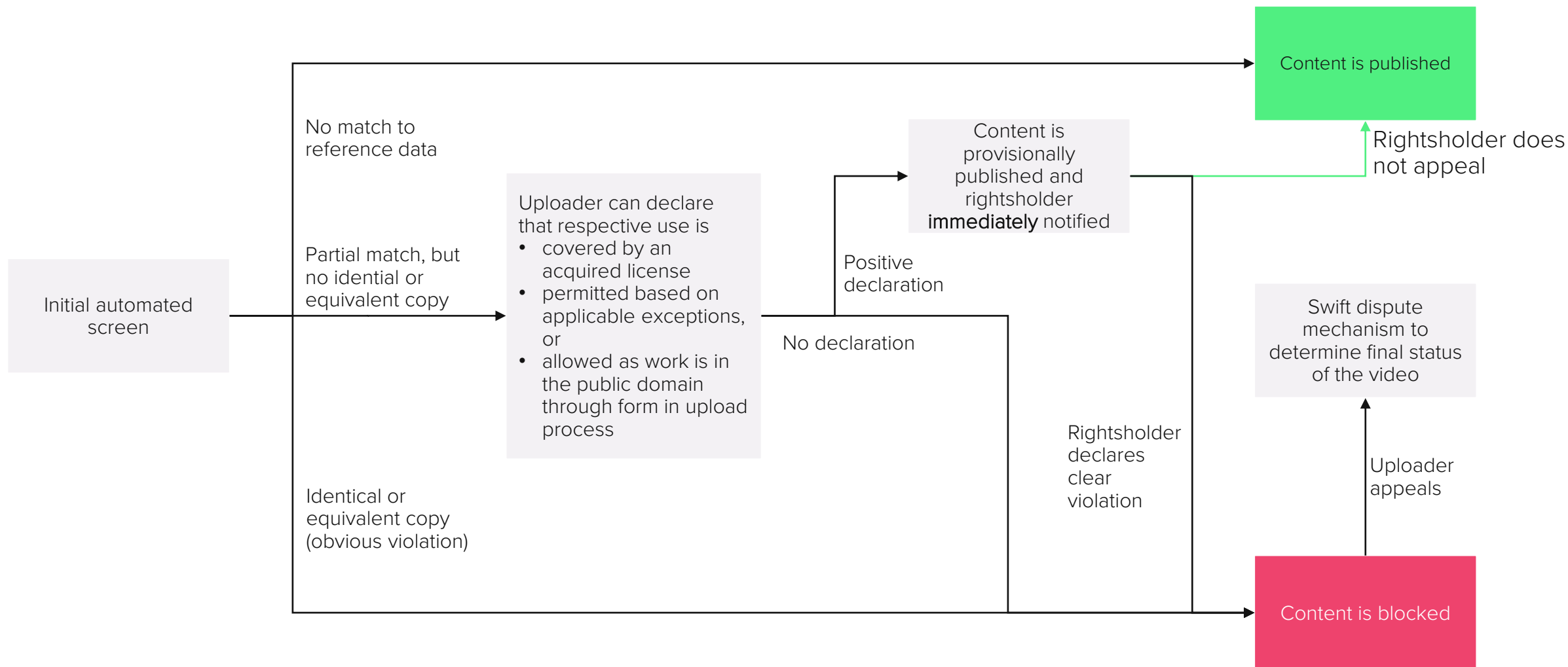
> Platforms need to make sure to effectively protect user rights and freedoms



> **Rightsholder can request immediate takedown in case of clear violation**
Example: Full copy of a work deliberately modified to evade filters.

Protecting user rights and freedoms

> Platforms need to make sure to effectively protect user rights and freedoms

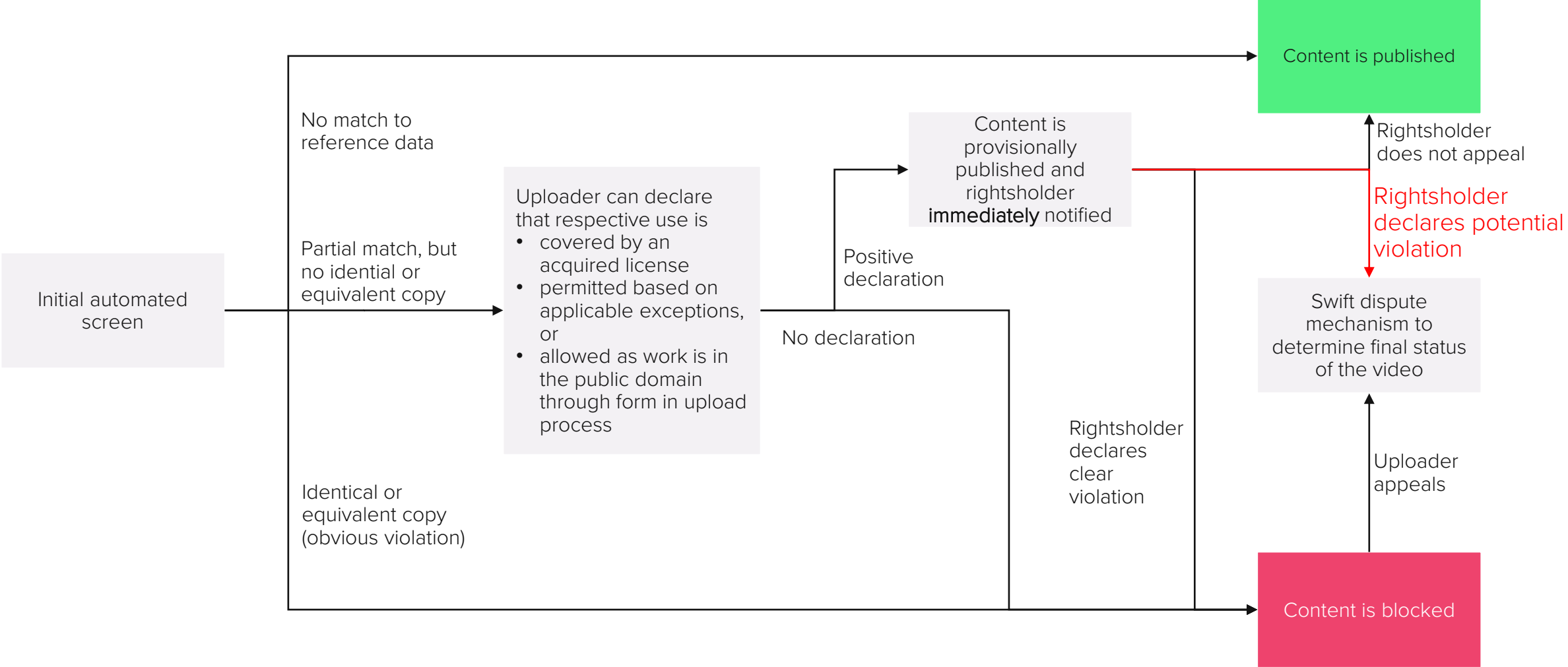


> User rights (paragraph 9) protected if there is no appeal from rightsholder

Protecting user rights and freedoms



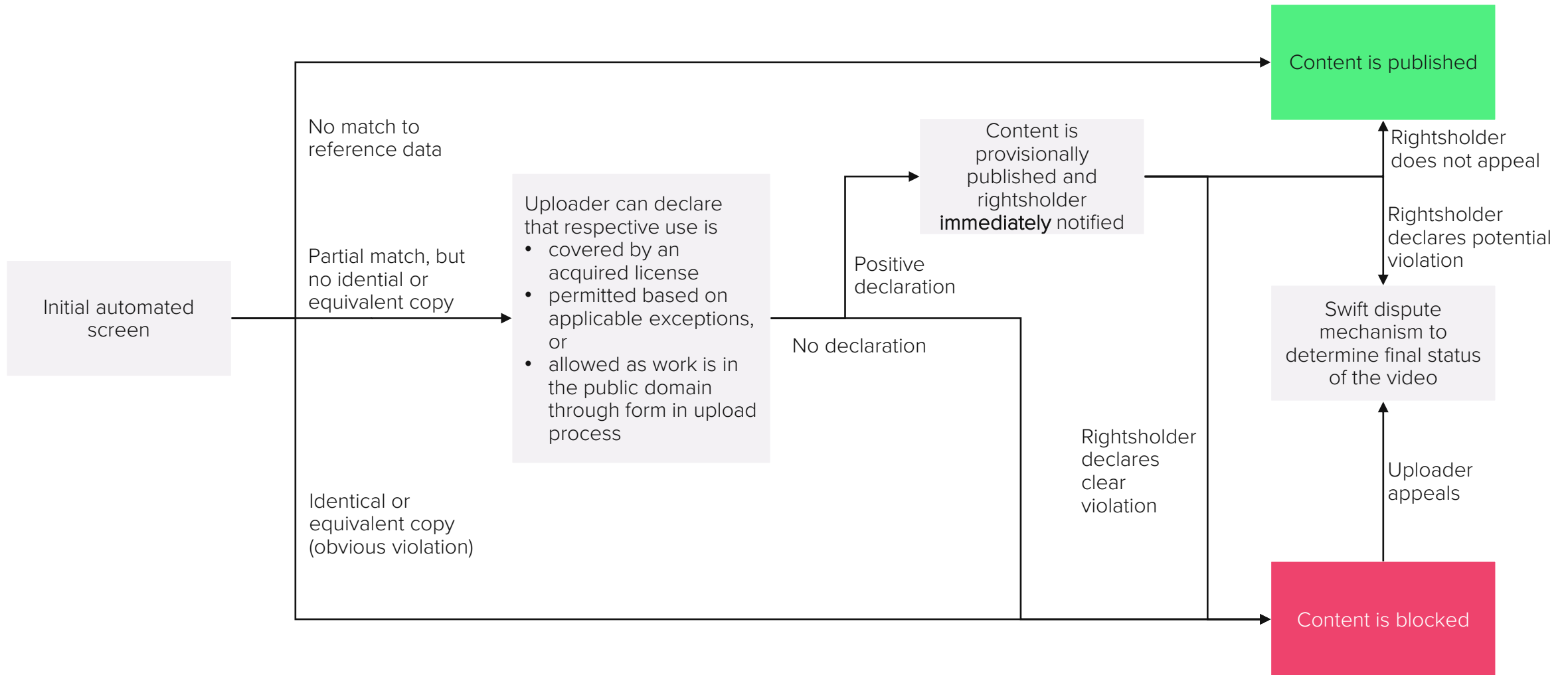
> Platforms need to make sure to effectively protect user rights and freedoms



> Dispute mechanism permits rightholders to challenge potential violations

Protecting user rights and freedoms

› Platforms need to make sure to effectively protect user rights and freedoms



- › Platforms need to be able to sanction repeated abuse of either positive declarations or declaration of „clear violations“
- › This process does not prevent contractual arrangements like revenue claiming instead of content blocking as long as these neither limit rightsholder nor user rights

Protecting user rights and freedoms

- > Platforms need to make sure to effectively protect user rights and freedoms

Potential implementation

- > **Limit upfront filtering to obvious (prima facie) copyright infringement, e.g. full episode of TV-Series**
- > **Preflagging procedure and swift dispute mechanisms**

What this means

- > Automated blocking of uploads only for content identical (or equivalent) to provided reference files; pre-filtering and blocking of unclear cases not proportionate.
- > Uploaders still entitled to the safeguards of Article 17 (9)
 - I. covered by an acquired license or
 - II. is permitted based on applicable exception(s) (e.g. „This is a permissible parody.“) or
 - III. is allowed as work is in the public domain
- > If users do provide such declaration, it should technically qualify as a „complaint“ (Art. 17 (9)), content stays online, and OSCCPs should immediately inform rightsholder.
- > Rightsholders can then trigger dispute mechanism or request an immediate takedown in case of a clear violation. In this case, uploader can challenge blocking decision via dispute mechanism provided while content stays down.
- > Sanctions for repeated misuse of declaration possibility for uploaders or repeated misuse of immediate takedowns by rightsholders.
- > Possibility to contractually agree on other mechanisms (e.g., revenue claiming) instead of content blocking

What else is needed

- > Member States and platforms need to make sure to effectively protect user rights and freedoms

Potential implementation

- > **Transparent and efficient redress mechanisms**
- > **Filters need to respect exceptions and limitations (paragraph 7) and in no way prevent legitimate uses (paragraph 9)**
- > **Centralised meta-repository for reference files**

What this means

- > Member states should set firm and uniform **deadlines and guidelines for redress mechanism** (time is of the essence)
- > Member states should set up **proportionate reporting duties for OCSSPs** with respect to functioning of complaint and redress mechanisms
- > Member states should ensure that
 - automated **content blocking only applies for obvious copyright violations** (identical or equivalent matches) unless future systems (e.g., AI based) would be able to reliably recognize mandatory exceptions and limitations including their contextual aspects
 - that **exceptions and limitations mentioned in Article 17(7) shall be deemed mandatory user rights**; the same should apply to **exceptions in Art. 5 Infosoc-Directive** to assert uses permitted by law in the respective member state
- > It is burdensome for rightsholder to provide each and every OCSSP with the respective reference files
- > An optional centralised and reliable meta-repository for reference files on European level would be great to have (optional for rightsholders; mandatory use for OCSSPs)

Agenda.



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> Protecting user freedoms



> **A possible way forward**

Bringing it all together

› Here is what a sensible implementation balancing various needs could look like



- › **Clearly outlined steps for obtaining authorization** (taking into account proportionality and the factual impossibility to identify each and every rightsholder in AV-content)
- › Ensure **access to appropriate protection mechanisms and license agreements** for all rightsholders
- › **Upload blocking and automated stay-downs only for prima facie obvious infringements**
- › **All other content to remain available during dispute and redress mechanisms**
- › **Clearly defined dispute** and redress mechanism
- › **Public transparency** over dispute process and statistics