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Article 17 stakeholder dialogue: What we have learned so far – Part 2

Paul Keller (Institute for Information Law (IViR)) · Tuesday, January 14th, 2020

Part 1 of this post outlined two of the three main takeaways from the Article 17 stakeholder dialogue so far. This part will cover the third of these, lack of transparency, and look ahead to the next phase of the dialogue.

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Lack of transparency on all sides

There was finally one issue that all stakeholders could agree on: a lack of transparency when it comes to current practices. However, the agreement quickly dissipates when looking at the question in more detail, as each group of stakeholders seems to be concerned about different types of transparency. Rightholders' representatives have expressed frustration with the ability of platforms to set their own policies for monetisation of content on the platforms. Platforms have expressed concerns that rightholders cannot be trusted when it comes to ownership claims and responsible use of automated removal mechanisms. User rights representatives have pointed out that there is a total lack of transparency when it comes to automated removal of content from platforms.

It is clear that the general lack of trust between the different stakeholders is one of the key problems that the stakeholder dialogue will need to address. This lack of trust boils down to two distinct but interrelated issues: a lack of transparency when it comes to ownership information and a lack of transparency when it comes to the policies implemented by platforms. While the latter issue is partially addressed by paragraph 17(8) of the CDSM directive, which requires platforms to provide rightholders "with adequate information", the former problem is not directly addressed by the directive.

However, the lack of transparency when it comes to the current practices and policies of platforms cannot be attributed to the platforms alone. During the stakeholder dialogue, it became clear that they are the result of commercial arrangements between platforms and major rightholders, who exert considerable influence over how their content can be used by platforms. One of the key shortcomings of the stakeholder dialogue so far has been a failure to shed light on these agreements, with both platforms and rightholders hiding behind mutual confidential agreements (while blaming each other for the problematic aspects of their agreements). As the host of the stakeholder dialogue, the Commission has so far failed to compel stakeholders to give real insight into their commercial practices. This failure means that so far the discussions lack a solid empirical basis and that observers have no choice other than to accept statements by stakeholders at face value.

The next stage of the stakeholder dialogue will need to show if there is a real willingness to change this status quo and use the provisions in paragraph 17(8) to enforce more transparency. One aspect that will be addressed in this context is the status of rights management systems like YouTube's Content ID and Facebook Rights Manager. Will platforms continue to be allowed to operate these as private systems that operate largely independent of public scrutiny and where platforms and major rightholders can make up their own rules, or will Article 17 lead to a situation where these systems receive more public and regulatory scrutiny? User rights representatives and some collective management bodies have made it clear that they would like to see the latter, but it remains to be seen whether the Commission (and Member States) will muster the political will to go beyond the minimal requirements of paragraph 17(8) here.

The same question arises with regards to the quality of ownership information. While the discussions in the stakeholder dialogue have made it clear that incorrect ownership claims are both common and cause problems for almost all stakeholders (users having content removed by parties without rights to do so, platforms having to deal with incorrect and contradictory information, and rightholders having to deal with incorrect claims related to their own content), the CDSM directive does not provide an obvious answer to this problem. User rights organisations have proposed that, in order to allow for public scrutiny of ownership claims, all requests to block or remove content pursuant to Article 17(4) should be made via a centralised public database, but given the lack of such a requirement in the CDSM directive, such an approach would require commitment by all stakeholders. Given the discussions so far, this seems like an unrealistic expectation even though this approach would have clear benefits for all stakeholders (rightholders would not have to provide information to lots of platforms, platforms could rely on a single source of information and users

would be able to scrutinise ownership claims).

The next phase of the stakeholder dialogue

For the third phase of the stakeholder dialogue to produce any outcomes that go beyond re-stating what is in the directive, all of these tensions will need to be resolved and the different types of stakeholders will need to look for common ground. One obstacle is that until now the Commission has not revealed any details about the nature of the guidelines that it will need to draft and publish based on the input from the stakeholder dialogue.

Resolving some of the tensions that have surfaced in the past meetings will likely require an approach to these guidelines that is willing to seek consensus in areas that are not directly addressed by the text of Article 17. This would concern guidelines on licensing modalities for different sectors, transparency obligations that go beyond the limited scope of paragraph 17(8) and procedural safeguards for user rights that take into account inherent technical limitations of automated content recognition systems.

Next meetings: The 5th meeting of the stakeholder dialogue will take place on the 16th of January from 1000-1830h and will focus on "authorisations and 'best efforts' to obtain an authorisation", "'best efforts' to avoid unauthorised content" and "notices submitted by rightholders to remove unauthorised content". The 6th meeting will take place on 10th February and will focus on "safeguards for legitimate uses of content", "redress mechanism for users" and "information to rightholders". Both meetings will be live streamed on the Commission's website.

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