Kluwer Copyright Blog

Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis

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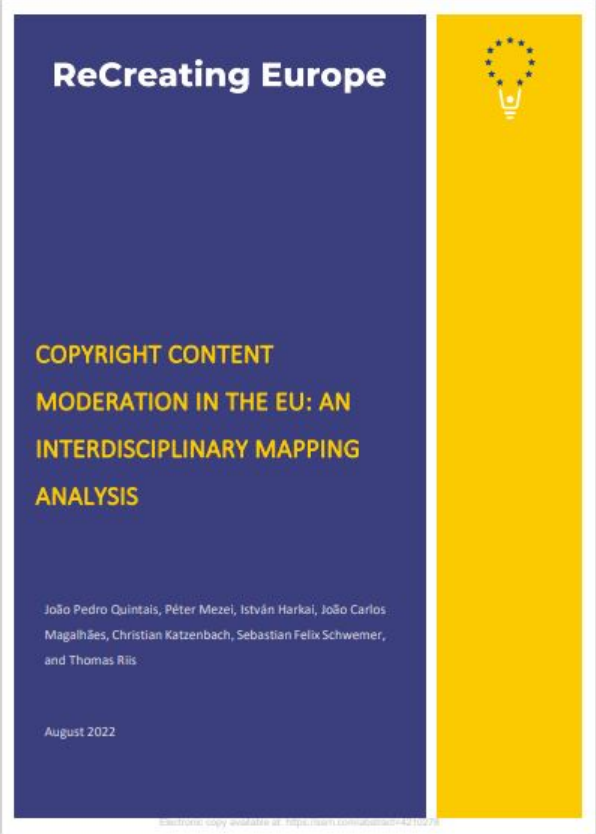
In the context of the reCreating Europe project a recent interdisciplinary report was published on Copyright Content Moderation in the EU. The report addresses the following main research question: how can we map the impact on access to culture in the Digital Single Market (DSM) of content moderation of copyright-protected content on online platforms? This post provides a brief outline of the report and reproduces its main recommendation. Since the report is quite lengthy, readers interested in a more detailed overview of the findings are invited to read the executive summary, available on pages 14 to 23 of the report.



What the report covers

The report consists of six chapters. After a brief introduction in Chapter 1, Chapter 2 develops a conceptual framework and interdisciplinary methodological approach to examine copyright content moderation on online platforms and its potential impact on access to culture. The analysis clarifies our terminology, distinguishes between

platform "governance" and "regulation", elucidates the concept of "online platform", and positions our research in the context of regulation "of", "by" and "on" platforms.

Chapter 3 carries out a legal mapping of the topic of this report at EU level. Our focus here is the legal regime of art. 17 of the Copyright in the Digital Single Market Directive (**CDSMD).** We first provide some context on the legal regime that precedes the CDSMD. We then briefly explain the legislative process leading to the adoption of the Directive, followed by a snapshot of the legal regime, including remarks relating to the European Commission's stakeholder consultations and the Commission's Guidance on art. 17, and the action for annulment of art. 17 initiated by the Polish government in Case C-401/19. This is followed by a detailed analysis of art. 17, with an emphasis on its liability regime and rules with implication for copyright content moderation by OCSSPs. The chapter closes with an examination of the interface of art. 17 CDSMD with the Digital Services Act (DSA), the final version of which was agreed on in the concluding stages of this Report.

Chapter 4 provides an analysis of the findings of our comparative legal research at national level. The findings are based on two legal questionnaires carried out with national experts in ten Member States, before and after the implementation due date of the CDSMD. The *phase one* questionnaire focused on the status quo in this field of law. The *phase two* questionnaire was dedicated to the national implementations of art. 17 CDSMD, and the consequences of such implementation. The collected data highlighted both the similarities and, in some cases, remarkable differences in the Member States' legal systems both before and after art. 17 CDSMD, which cast doubt on the effectiveness of the provision for EU harmonisation in this field.

Chapter 5 uses qualitative methods to map out the copyright content moderation structures of key social media platforms, with a focus on their Terms and Conditions and automated systems. The chapter first presents empirical findings regarding which kinds of public documents and rules have been adopted by a sample of 15 platforms, categorised as *mainstream* (Facebook, YouTube, Instagram, Twitter, SoundCloud), *alternative* (Diaspora, Mastodon, DTube, Pixelfed, Audius) and *specialised* (Vimeo, Twitch, Pornhub, FanFiction, Dribble). It also provides an in-depth longitudinal examination of how the copyright content moderation rules of six case studies (Facebook, SoundCloud, PornHub, FanFiction, Diaspora, and DTube) have changed since these platforms' launch, as well as a comparison between three automated copyright content moderation systems: Content ID (YouTube), Audible Magic (several platforms) and Rights Manager (Meta/Facebook), with a thorough description of the last one.

Then, the chapter suggests that two dual processes seem to mark the evolution of platforms' copyright content moderation structures: (1) over time, these structures became more complex (more rules, spread on more types of documents), and opaquer (harder to access and understand); and (2) the control over copyright content moderation tilted strongly towards platforms themselves, a development that helped concentrate power in the hands of both platforms and large rights holders, at the expense of ordinary users and creators. While not equally true for all platforms we analysed, *complexification/opacification*, and *platformisation/concentration* seem to be some of the clearest developments in the recent history of private regulation of

copyright content moderation.

Finally, Chapter 6 concludes with a summary of our analysis and recommendations for future policy actions (pages 290-302).

Recommendations for future policy actions

This is an interdisciplinary mapping report, which will be followed by a normative and evaluative report. As such, the following recommendations are limited to the type of analysis carried out so far and should be understood in that light. These recommendations will be revised and updated at a later stage to reflect our subsequent research.

- Considering the potential for legal uncertainty and fragmentation of the digital single market as regards copyright content moderation, we recommend that the Commission reviews its Guidance on art. 17 CDSMD (COM/2021/288 final) in order to provide clearer guidelines on the definition of OCSSPs, especially for small and medium-sized online platforms.
- National legislators should review their national transpositions of art. 17 CDSMD to fully recognize the nature of the exceptions and limitations in paragraph (7) as "user rights", rather than mere defences.
- We further recommend that the Commission reviews its Guidance in order to provide guidelines from the perspective of EU law as to the concrete implications of a "user rights" implementation of paragraph (7) in national laws. This should include, to the extent possible, concrete guidance on what type of actions users and their representatives (e.g., consumer organisations) may take against OCSSPs to protect their rights.
- National legislators should review their national transpositions of art. 17 CDSMD to ensure that *ex post* complaint and redress mechanisms under paragraph (9) are not the only means to ensure the application of user rights, but rather a complementary means, in line with the Court's judgment in Case C-401/19.
- We further recommend that the Commission's Guidance is updated to fully reflect the Court's approach in case C-401/19, as regards the complementary role of complaint and redress mechanisms under paragraph (9).
- The Commission should review its Guidance to clearly align it with the Court's judgment in case C-401/19, namely by clarifying that: (1) OCSSPs can only deploy *ex ante* filtering/blocking measures if their content moderation systems can distinguish lawful from unlawful content without the need for its "independent assessment" by the providers; (2) such measures can only be deployed for a clearly and strictly defined category of "manifestly infringing" content; and (3) such measures cannot be deployed for other categories of content, such as "earmarked content". Member States should further adjust their national implementations of art. 17 CDSMD to reflect these principles.
- In implementing these principles, the Commission and Member States could take into consideration the approach proposed by the AG Opinion on how to limit the application of filters to manifestly infringing or "equivalent" content, including the consequence that all other uploads should benefit from a "presumption of

lawfulness" and be subject to the *ex ante* and *ex post* safeguards embedded in art. 17, notably judicial review. In particular, the AG emphasized the main aim of the legislature to avoid over-blocking by securing a low rate of "false positives". Considering the requirements of the judgment, in order to determine acceptable error rates for content filtering tools, this approach implies that the concept of "manifestly infringing" content should only be applied to uploaded content that is identical or nearly identical to the information provided by the rightsholder that meets the requirements of art. 17(4) (b) and (c) CDSMD.

- The Commission should review its Guidance to clarify which provisions in the DSA's liability framework and due diligence obligations Chapters apply to OCSSPs despite the *lex specialis* of art. 17 CDSMD, within the limits of the Commission's competence as outlined in art. 17(10) CDSMD.
- At EU level, EU institutions and in particular the Commission should explore to what extent copyright *acquis* already contains rules addressing content moderation actions relating to monetization of copyright-protected content on online platforms (e.g., in arts. 18 to 23 CDSMD), and to what extent policy action is needed in this area. Further research is needed specifically on the imbalanced nature of the contractual relationship of online platforms and uploading users, as well as in the transparency and fairness of their remuneration.

At EU level, EU institutions and in particular the Commission should explore the application of the DSA's provisions on transparency and access to data to OCSSPs and non-OCSSPs hosting copyright protected content, as well as study, and if adequate propose EU level action that imposes transparency and access to data obligations on online platforms regarding their copyright content moderation activities. Inspiration could be drawn from the design and implementation of the German national transposition law under Section 19(3) UrhDaG as regards rights to information. In that context, special care should be taken to assess the potential negative effects of requiring researchers to reimburse the platforms' costs related to complying with such requests. To the extent possible, the Commission should advance recommendations in this direction in its revised version of the Guidance on art. 17 CDSMD.

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