EFF comments on the implementation of Art 17 C-DSM in Germany

***Zusammenfassung**: Die Electronic Frontier Foundation (EFF) gehört zu den führenden gemeinnützigen Organisationen, welche die Grundfreiheiten in der digitalen Welt verteidigen. In unserer Stellungnahme zum Diskussionsentwurf für ein Zweites Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts empfehlen wir, den Fokus auf Nutzer:innenrechte und Grundrechtsschutz zu setzen. Während der Diskussionsentwurf einige positive Elemente beinhaltet um Overblocking zu vermeiden, führt er in der derzeitigen Fassung dennoch zu unzulässigen allgemeine Überwachungspflichten und dem Einsatz von unzulässigen Filtertechnologien. Weitere Schutzvorkehrungen sind notwendig um sicherzustellen, dass Online-Dienste nicht zu einer Urheberrechtspolizei mit spezieller Filter-Lizenz zu gemacht werden.*

The Electronic Frontier Foundation (EFF) is among the leading non-profit organizations defending civil liberties in the digital world. 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. We welcome the opportunity to provide input to the Discussion Draft for a Second Draft Act Adapting Copyright Law to the Requirements of the Digital Single Market ("Discussion Draft"). Below, we will comment on certain key provisions of that Discussion Draft and substantiate further issues, which should be addressed in an implementation bill.

Services Providers and Services Not Covered

Recital 62 to the C-DSM explains that the definition of an online content-sharing service provider should target only online services that "compete with other online content services". EFF welcomes the clarification (§ 2(1)(4)) that the scope is limited to competing services providers. We also welcome that the Discussion Draft works with a non-exhaustive list of services not covered (§ 3). However, we recommend introducing a flexible review mechanism to update the list in light of future technological developments.

Contractual rights of use: "every effort" vs "best efforts"

Pursuant to § 4 of the Discussion Draft, a service provider is obliged to make "every effort" to acquire the contractual rights of use for communication. However, the C-DSM speaks of "best efforts", which is a term of art and must be interpreted as such. The best efforts-criterion is not an obligation to deliver an outcome (prevention of copyright infringements), but a due diligence duty to seek to ensure an outcome in light of the principles of proportionality and user rights protections. The term "every effort" thus undermines the protective purpose of Art 17 C-DSM by extending the service provider's duty to take every conceivable measure, which comes close to an obligation to deliver a certain outcome. We recommend to redraft this provision and correctly transpose the C-DSM.

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Measures that seek to protect user rights

We welcome the commitment of the Discussion Draft to protect users against illegitimate filtering of content, as demonstrated by the option for users to pre-flag uploads as contractually or legally authorized ("online by default", § 8) and by the acknowledgment that important authorized uses are "mechanically non-verifiable" (§ 4). We also welcome the introduction of a *de-minimis* exception (§ 6). Any attempt to safeguard everyday uses are a clear added value from a user-perspective. It is another positive step towards a more user-centred implementation of the C-DSM that the Discussion Draft addresses abusive removal requests by self-proclaimed rightsholders (§ 19).

However, there are many elements that require improvement. First and foremost, user rights only exist on paper if service providers can undermine them through contractual override. We recommend ensuring that terms of conditions of service providers should never erode statutory user rights. We also have concerns as regards the design of the *de-minimis* use provision. Its introduction is a welcome improvement; however, it raises concerns about the use of filter technologies necessary to "mechanically verify" authorized uses. Mandated automated verification technologies are at odds with the ban of general monitoring and hard limits can easily lead to blocking of legitimate user content. Also, the restriction to non-commercial purposes should be abandoned as it has no role to play at the level of content moderation; neither Europeans' fundamental rights nor the mandatory copyright exemptions established in the C-DSM are contingent on non-commercial activity.

When it comes to pre-flagging of authorized uses, the Discussion Draft fails to guarantee the lawful use of content in the public domain and other content that is not protected by copyright. The same holds true for content use that is not explicitly covered, such as live-streams or content that was uploaded before the entry into force of the relevant provisions. We also would like to stress our concern that the current design of the flagging-mechanism could lead to mandatory flagging obligations imposed on users. The Draft Implementation Bill should make clear that flagging is a mere option when uploading content. Most importantly, it is unfortunate that the Discussion Draft foresees the blocking and removal of "uses pre-flagged as authorized" (§ 12) if such flagging is "obviously incorrect". The arbitrary 90% matching threshold establishes automated filter systems and will invite error and blocking of perfectly legitimate content.

User Rights and Fundamental Rights Protection

EFF stresses the need to have 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. Fundamental rights protection must be protected ex ante, at the latest 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, which are not able to perform context-sensitive interpretations. There is legislative leeway to make sure, as Art 17(7) of the C-DSM sets out, 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.

However, in its current shape, the Discussion draft fails to adequately protect user rights and freedom of expression. §§ 10-12 mandate the blocking and removal of non-authorized uses, as well as the blocking and removal of uses pre-flagged as authorized without providing sufficient safeguards to users. In the current version, it seems inevitable that service providers will use content recognition technologies to monitor all user uploads and assess them against the information provided by rightsholders. The exception for pre-flagged with the 90% matching threshold only aggravates this problem as it motivates general monitoring of user content and automated decision-making in violation of the GDPR (see below). We recommend to move away from a stay-down approach and clarify that the use of filter technology is not required to fulfil the obligations under Art 17 C-DSM.

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, 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.

However, the Discussion Draft does not safeguard data protection rights. The mandated removal and blocking of user content, and in particular the assessment of whether user flagging is "obviously incorrect", will require subjecting users to automated individual decision-making. To benefit from the legitimate use of such systems, suitable measures are necessary to safeguard users' rights, freedoms, and legitimate interests. However, the Discussion Draft does not provide for such safeguards beyond ex-post focused legal remedies, such as internal complaint procedures and access to courts. We recommend to reconsider the current design of the removal and flagging-mechanisms in light of data protection and privacy requirements.

Best regards,

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