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What is Article 17 of the DSM Directive and how is it relevant for STM Publishers?

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What is Article 17 of the DSM Directive and how is it relevant to STM Publishing?

- **Article 17 DSM – use of protected content by online content sharing service providers (OCSSP)**
- **Why is Article 17 DSM relevant?**
 - In recent years, increasing number of platforms providing access to large amount of copyrighted works, including in the STM Publishing industry, and have become a main source of access to content online
 - While those platforms can offer a wider access to culture they also generate challenges when content is uploaded without prior authorization
 - Platforms qualifying as OCSSPs are now responsible for the content uploaded by their users and to which they give access to the public

What is Article 17 of the DSM Directive and how is it relevant to STM Publishing?

- **Why is Article 17 DSM relevant (continued)?**
 - Offers an unprecedented opportunity for rightsholders including STM publishers to gain back control of their content and to cooperate with OCSSPs
 - There are also OCSSPs in the STM Publishing sector.
 - STM publishers already interact with 40+ platforms, some of which are owned by publishers and some others are not
 - As of 7 June 2021, all platforms qualifying as OCSSPs including in the STM Publishing industry have to comply with the obligations under Article 17 of the DSM Directive

What is an Online Content Sharing Service Provider (OCSSP)?

- Platforms in the STM publishing sector can also be OCSSPs if they fulfill the criteria under Article 2(6) DSM
- Criteria
 - Information society service provider
 - main or one of the main purposes is to store and give the public access
 - to a large amount of copyright-protected works or other protected subject matter
 - uploaded by its users
 - which it organizes and promotes for profit-making purposes
- Exclusions – e.g. not-for-profit online encyclopedias, not-for-profit educational and scientific repositories

How does Article 17 DSM work?

- The directive recognizes that OCSSPs are liable for the content they host and give access to the public (act of communication to the public).
- 2 mechanisms
 - **Licensing mechanism:**
 - The OCSSP can obtain an authorization (eg license) for the use of a rightholder's content uploaded by its users
 - However, It is not always possible to have a license concluded with a platform for a variety of reasons
 - **Liability mechanism:**
 - When there is no authorization, the starting point is that the OCSSP is presumed liable unless it can demonstrate best effort
 - One of the goals of article 17: protect and allow rightholders to determine whether, and under which conditions their content is used
 - Therefore a liability mechanism was needed when the content is uploaded by users on the platform without the consent of the rightholder

Towards more responsibility for OCSSPs – Article 17(4) DSM

OCSSPs are presumed liable for unauthorized content uploaded by its users that they store and give access to the public unless they demonstrate best efforts

3 cumulative conditions

1. They need to demonstrate best efforts to obtain an authorization (license)
2. They need to demonstrate best efforts to ensure the unavailability of specific content for which the rightholders have provided **relevant and necessary information**
3. They demonstrated that they acted expeditiously, upon **receiving a sufficiently substantiated notice to disable access and remove content**, and made best efforts to prevent their **future upload**

“Best efforts” and “relevant and necessary information”

2 key concepts

- **“best efforts”** – a very high standard of obligation for OCSSPs
 - OCSSP liable unless demonstrated best efforts – in accordance with high industry standards of professional diligence
 - Obligation of best efforts triggered when rightholders have provided **relevant and necessary information**
- **“Relevant and necessary information”** - sector specific approach, even a sub-sector specific approach
 - STM publishers, as other rightholders, shall provide “relevant and necessary information” in order for the platform to ensure the unavailability of specific works and/or provide information for speedy take down /stay down

The Bottom-Line

What does that mean?

- If the OCSSP failed to demonstrate best efforts, it is liable.
- While the burden is on the platform, the mechanism encourages cooperation between rightholders and OCSSPs to address the issue of unauthorized content uploaded by users in a proactive way, while not mandating any specific mean to do so.
 - Sector specific approach; content specific approach; case by case (if not possible, recourse to notices still possible)
 - By using eg metadata, APIs and other tools that can address this issue in a rationalized, real-time, streamlined way
- Article 17 provides the means for rightholders to protect their content preventively by cooperating with the platforms in their industry, but does not remove the possibility to tackle illegal content ex post
- In the STM Publishing sector too, academic platforms have to demonstrate best efforts when STM publishers have provided the relevant and necessary information

Questions?

Thank you!

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