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Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics

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On 17 May 2019 the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market was officially published (DSM Directive). Article 17 (ex-Article 13) is one of its most controversial provisions. Article 17(10) tasks the Commission with organising stakeholder dialogues to ensure uniform application of the obligation of cooperation between online content-sharing service providers (OCSSPs) and rightholders, and to establish best practices with regard to appropriate industry standards of professional diligence.

This document offers recommendations on user freedoms and safeguards included in Article 17 of the DSM Directive – namely in its paragraphs (7) and (9) – and should be read in the context of the stakeholder dialogue mentioned in paragraph (10).

PROMOTING LICENSING AND LIMITING PREVENTIVE MEASURES

Article 17 provides OCSSPs with two avenues to avoid direct liability for their users' uploads. The default avenue is for an OCSSP to obtain an authorisation to communicate the content uploaded by users. The provision suggests, as only one example, (direct) licensing from the copyright holder but leaves open other ways to acquire authorisation.¹ Besides direct licensing, additional options may include collective licensing mechanisms (voluntary, extended or mandatory), and statutory licensing (relying on remunerated exceptions or limitations).

OCSSPs that do not obtain an authorization for their users' uploads can still avoid liability if they comply with the conditions of the exemption mechanism in Article 17(4). OCSSPs must demonstrate that they have: (i) made best efforts to obtain an authorisation; (ii) made best efforts to ensure the unavailability of specific works for which the rightholders have provided them with the relevant and necessary information; and (iii) acted expeditiously, subsequent to notice from rightholders, to take down infringing content and made best efforts to prevent its future upload.

The legislative design of Article 17 clearly favours the first – authorisation – avenue. As noted in the statement by Germany accompanying the approval of the Directive in the Council in April 2019, “in the European compromise, licensing is the method chosen to achieve” the authorization goal under this provision.² This is in line with the Directive's objective to “foster the development of the licensing market between rightholders and [OCSSPs]”.³

National implementations of this provision should therefore focus on achieving this goal, by fully exploring legal mechanisms for broad licensing of the uses covered by Article 17. In that light, they should limit, to the extent possible, the application of preventive obligations in Article 17(4)(b) and (c). Otherwise, the freedom of EU citizens to participate in democratic online content creation and distribution will be encroached upon and freedom of expression and information in the online environment would be curtailed.

¹ See Article 17(1), second subparagraph, and 17(8), second subparagraph DSM Directive.

² See Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market amending Directives 96/9/EC and 2001/29/EC (first reading) – adoption of the legislative act – statements (2019), in particular the Statement by Germany, para. 10.

³ Recital 61 DSM Directive.

The following baseline approach will better enable the formulation of national laws to respect user freedoms and safeguards enshrined in Article 17. Although the essence of these freedoms and safeguards should at all times be respected in the terms outlined below, it is noted that they are at greater risk in the context of application of preventive obligations and restrictive licensing models than under umbrella licensing approaches covering a wide variety of content, including recent content releases.

USER FREEDOMS: EXCEPTIONS AND LIMITATIONS IN ARTICLE 17

The licensing and preventive obligations in Article 17 must be interpreted in the context of the rules on exceptions and limitations (E&Ls) contained in Article 17(7), as supplemented by the procedural safeguards in paragraph (9). Furthermore, it is important to consider other E&Ls potentially applicable to user uploads, such as that of incidental use, in Article 5(3)(i) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive).

Article 17(7) includes a general and a specific clause on E&Ls. The general clause is contained in the first sub-paragraph, which states that the preventive obligations in 4(b) and (c) should not prevent that content uploaded by users is available on OCSSP platforms if such upload does not infringe copyright, including if it is covered by an E&L. This should be read in combination with the statement in Article 17(9) to the effect that the DSM Directive “shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”. In this respect, Recital 70 emphasizes the need for the preventive obligations to be implemented without prejudice to the application of E&Ls, “in particular those that guarantee the freedom of expression of users”.

The second paragraph of Article 17(7) of the DSM Directive includes a special regime for certain E&Ls. It states that “Member States shall ensure that users” of OCSSPs, when uploading or making available content, “are able to rely” on the following exceptions: (i) quotation, criticism, review; (ii) use for the purpose of caricature, parody or pastiche. Previously, these were optional E&L in Articles 5(3)(d) and (k) of the InfoSoc Directive, which have not been implemented in all Member States; where they have, the implementations differ.

Uploaded material that does not infringe copyright and related rights as mentioned in the general clause should at least include the following: (i) material in the public domain; (ii) material subject to an (express or implied) license; (iii) material covered by an E&L, either in Article 17(7) of the DSM Directive and/or in Article 5 of the InfoSoc Directive, the latter if implemented by the national law (e.g. incidental use). In situations of conflict between Article 17(7) of the DSM Directive and Article 5 of the InfoSoc Directive (i.e. an E&L is explicitly mentioned in Article 17(7) but unavailable at the national level), the former creates an obligation under EU law to implement national E&Ls that offer the minimum user privileges to which Article 17(7) refers.

Regarding the special regime for certain E&Ls, Recital 70 (first subparagraph) explicitly recognizes that these are particularly important to strike a balance under the Charter of Fundamental Rights of the EU (Charter) between the right to intellectual property (Article 17(2)) and two fundamental freedoms/rights in particular: freedom of expression (Article 11) and freedom of the arts (Article 13). The legislator thus awards special status to these E&L due to their basis in fundamental rights. Moreover, there is a change in legal qualification as compared to the InfoSoc Directive, since the E&Ls mentioned in the second paragraph of Article 17(7) of the DSM Directive become *mandatory* in the context of their application under Article 17. This is clear from the text of the provision – “shall ensure” – and from Recital 70 (first subparagraph), which states that such E&L “should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union.”

In light of the above, both a literal and teleological interpretation favour the qualification of the E&Ls in Article 17(7) as *user rights or freedoms*. It follows that national lawmakers and courts must ensure that they remain fully operative despite licensing arrangements (between rightholders or their representatives and

OCSSPs) and preventive obligations under Article 17(4)(b) and (c) that are likely to make inroads into this area of freedom of EU citizens.

It is important to clarify the scope of these mandatory E&Ls or user rights/freedoms. They are mandatory not only for: (i) the acts covered by the specific right of communication to the public regulated in Article 17; but also (ii) for all acts of uploading or making available by users on OCSSP platforms that meet the requirements of the relevant E&Ls.

The main distinction is that the right of communication to the public in Article 17 requires that the initial act of making available by the user is of a non-commercial character or purpose, whereas the relevant E&Ls do not include such a requirement, neither in the text of Article 17(7) nor in the corresponding provisions in the InfoSoc Directive.

This interpretation is not precluded by the reference to “existing exceptions” in Article 17(7). Such reference is not to E&Ls already implemented into a specific national law at the discretion of a Member State. Rather, “existing” refers to those E&Ls already contained in EU law. In this case, the concepts in Article 17(7), second subparagraph, are well-established prototypes already existing in Article 5 of the InfoSoc Directive.

This reading is supported by a systematic and teleological interpretation of the DSM Directive. First, Recital 70 does not restrict the application of these E&Ls to those previously implemented in Member States, but rather assumes its mandatory application across the EU to the benefit of all users of OCSSPs. Second, the fundamental rights basis of the E&Ls, their mandatory nature, and effectiveness of harmonization, as one of the main purposes of the provision, would be undermined if these E&Ls would only be implemented in certain Member States. Third, the reference to “users in each Member State” in Article 17(7) clearly indicates that the E&Ls are not meant to be implemented only in *some* Member States, but that these user rights/freedoms must be enjoyed in all Member States of the EU to the same effect.

The systematic and conceptual consistency of the E&Ls in the InfoSoc and DSM Directives must be ensured. This means that the concepts of “quotation”, “criticism”, “review”, “caricature”, “parody” and “pastiche” in Article 17(7) should be considered autonomous concepts of EU law, to be interpreted consistently across both directives, in line with CJEU case law.

The CJEU has already interpreted the concepts of “parody” and “quotation” in the InfoSoc Directive as autonomous concepts of EU Law in a number of judgements: *Painer* (C-145/10), *Deckmyn* (C-201/13), *Funke Medien* (C-469/17), *Pelham* (C-467/17) and *Spiegel Online* (C-516/17). From those judgements emerges a broad interpretation of the corresponding E&Ls, which recognizes their fundamental rights justification, clarifies their requirements for application, and restricts the ability of national lawmakers to further restrict their scope. To ensure the effectiveness of the E&Ls and user rights/freedoms in Article 17(7), Member States should adopt a similarly broad interpretation of the remaining concepts in that provision, in particular “pastiche”.

A combined broad interpretation and national implementation of the concepts contained in the E&Ls in Article 17(7) would cover the majority of transformative types of user-generated content uploaded by users to OCSSP platforms, such as remixes and mash-ups.

To fully achieve this objective and ensure the effectiveness of these user rights/freedoms, Member States should consider clarifying in their national laws that the E&L for incidental use applies fully in the context of acts of making available by users on OCSSP platforms. This approach is consistent with the wording of Article 17(9), according to which the DSM “Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”.

Finally, a rational national lawmaker implementing the E&Ls in Article 17(7) in line with the above recommendations should take this opportunity to fully harmonize the respective national E&Ls beyond uses concerning OCSSPs. That is to say, to the extent that they have not already done so, Member States

should take this opportunity to implement and/or extend the E&Ls of quotation, criticism, review, caricature, parody or pastiche to other types of online use, e.g. acts of making available by users to online platforms outside the definition of OCSSP in Article 2(6) of the DSM Directive.

USER SAFEGUARDS: MINIMIZING THE RISKS OF BROAD FILTERING AND OVER-BLOCKING

Under Article 17(9), first subparagraph, OCSSPs must implement “effective and expeditious” complaint and redress mechanisms for users in the event of disputes over the disabling of access to, or the removal of, uploaded content. The main justification for such mechanisms is to support the use of the mandatory E&Ls in paragraph (7) and ensure the uniform protection of resulting user rights/freedoms across the EU.⁴

These mechanisms entail obligations for both rightholders and OCSSPs. On the one hand, rightholders that request the disabling or removal of content must “duly justify” their requests.⁵ On the other hand, OCSSPs that administer complaint and redress mechanisms must: (i) process submitted complaints “without undue delay”; and (ii) subject decisions to disable or remove content to human review.

In addition, Member States must make available impartial out-of-court dispute settlement mechanisms, which mechanisms must not hinder users’ ability to seek judicial redress, in particular with a view to assert an applicable E&L, including the user rights/freedoms in paragraph (7).⁶

The legislative design of Article 17(9) leaves significant margin of discretion for Member States when implementing these procedural safeguards for users into national law. In order to avoid diverging national implementations and promote harmonisation across the EU, this margin of discretion should be used to ensure that OCSSPs optimize preventive measures for user rights/freedoms over the preventive measures in Article 17(4)(b) and (c), including in the design of the complaint and redress mechanisms in Article 17(9).

This interpretation, which is set out in more detail below, should be favoured by national lawmakers, since: (i) it meets the proportionality requirement in paragraph (5); (ii) it respects the mandatory nature and fundamental rights justification of the user rights/freedoms in paragraph (7); (iii) it has the best chance to comply with the prohibition of a general monitoring obligation in paragraph (8); and (iv) it complies with the requirements stated in paragraph (9), that the Directive “shall in no way affect legitimate uses” (such as uses under E&Ls) and that the complaint and redress mechanism must be “effective and expeditious”.

In light of the above, we recommend that where preventive measures in paragraphs (4)(b) and (c) are applied, especially where they lead to the filtering and blocking of uploaded content before it is made available to the public, Member States should, to the extent possible, limit their application to cases of *prima facie* copyright infringement. In this context, a *prima facie* copyright infringement means the upload of protected material that is *identical* or *equivalent* to the “relevant and necessary information” previously provided by the rightholders to OCSSPs, including information previously considered infringing. The concept of *equivalent* information should be interpreted strictly.

If content is disabled or removed in the *prima facie* infringement scenario, users are entitled to the safeguards included in Article 17(9) and explained above. In the remaining cases (no *prima facie* infringement) there should be no presumption that the uploaded content is infringing, meaning that such content should remain available to the public in the OCSSP until its legal status is determined, following a procedure consistent with Article 17(9). We recommend that such procedure abides by the following principles.

⁴ Recital 70, first subparagraph, last sentence DSM Directive.

⁵ Article 17(9), second subparagraph DSM Directive.

⁶ *Id.*

When the content uploaded by users does not meet the *prima facie* infringement threshold but partially matches the “relevant and necessary information” provided by the rightholder, OCSSPs must offer users the possibility to declare that the content at issue is covered by an E&L or user right/freedom.

The means to provide such declaration should be concise, transparent, intelligible, and be presented to the user in an easily accessible form, using clear and plain language (e.g. a standard statement clarifying the status of the uploaded content, such as “This is a permissible quotation” or “This is a permissible parody”).

If a user does not provide that declaration within a reasonable period of time, during or following the upload process, then the OCSSP should be *allowed* to disable or remove access to the content. If access to the content is disabled or removed, users may use the in-platform and out-of-court procedural safeguards in Article 17(9).

If a user provides such a declaration (in the simplified terms described above), the same should automatically qualify as a “complaint” under Article 17(9), triggering the mechanism set forth therein. The OCSSP must then inform the relevant rightholder of this complaint. If the rightholder wishes to remove or disable access to the content at issue it must duly justify its request, i.e. it must explain not only why the use in question is *prima facie* an infringement but also why it is not covered by an E&L and, in particular, the E&L invoked by the user.

The OCSSP will then subject the decision to disable or remove content to human review. The safeguards regarding the availability of out-of-court redress mechanisms and efficient judicial review remain applicable.

Since the legal status of the *prima facie* non-infringing user upload is only determined at the end of this procedure, OCSSPs that comply with the requirements of such procedure should not be liable for copyright infringement for the content made available to the public under Article 17 of the DSM Directive for the duration of the procedure.

In order to ensure the effective application and continued improvement of complaint and redress mechanisms Member States must ensure their transparency. A transparent complaint and redress procedure is necessary to enable: (i) the respect for and effectiveness of the mandatory E&Ls in Article 17(7); (ii) that subsequent out-of-court disputes are “settled impartially” and do not deprive users or their representatives (such as users’ organizations) of the legal protection afforded by national law, including the possibility to have recourse to efficient judicial remedies to assert the use of an applicable E&L, as required by Article 17(9).

To that effect, we recommend that national laws set up proportionate reporting duties for OCSSPs regarding the functioning of complaint and redress mechanisms. At the very least, national laws should clarify that users’ organisations shall have access to adequate information on such functioning.

Finally, we note that an underlying assumption for the application of the preventive measures in Article 17(4)(b) and (c) is that the necessary technology is available on the market *and* meets the legal requirements set forth in Article 17. In essence, preventive measures should only be allowed and applied if they: (i) meet the proportionality requirements in paragraph (5); (ii) enable the recognition of the mandatory E&Ls in paragraph (7), including their contextual and dynamic aspects; (iii) in no way affect legitimate uses, as mandated in paragraph (9).

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