

The New Copyright Directive: A tour d’horizon – Part II (of press publishers, upload filters and the real value gap)

Kluwer Copyright Blog
June 17, 2019

João Pedro Quintais (Institute for Information Law (IVIR))

Please refer to this post as: João Pedro Quintais, ‘The New Copyright Directive: A tour d’horizon – Part II (of press publishers, upload filters and the real value gap)’; Kluwer Copyright Blog, June 17 2019, <http://copyrightblog.kluweriplaw.com/2019/06/17/the-new-copyright-directive-a-tour-dhorizon-part-ii-of-press-publishers-upload-filters-and-the-real-value-gap/>

This post is part of a series on the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive).



Part I of this post discussed the legislative process and Titles I through III of the CDSM Directive. This Part II will tackle the remainder of the Directive, namely its measures to achieve a well-functioning marketplace for copyright (Title IV) and final provisions (Title V).

Measures to Achieve a Well-Functioning Marketplace for Copyright: Press Publishers’ Right, Platform Liability, and Fair Remuneration in Exploitation Contracts

Title IV contains the most controversial provisions of the Directive, namely the new right for press publishers and the new liability regime for user-upload platforms.

Press Publishers’ Right

The first chapter on *rights in publications* has two provisions: Articles 15 and 16. **Article 15** sets forth the new related right for press publishers, labelled by some critics during the legislative process as the “link tax” provision. (For previous analysis on this blog, see e.g. [here](#), [here](#), [here](#) and [here](#)).

The justification for the new right, as stated in Recitals 54 and 55, goes something like this. The re-use of press publications is a core part of the business model of certain information society providers, like online news aggregators and media monitoring services. Publishers have difficulty in licensing their rights to these providers. As a result, they cannot recoup their investment, namely their organisational and financial contribution to producing press publications. This investment is essential to “ensure the sustainability of the publishing industry and thereby foster the availability of reliable information”. To protect their investment and to facilitate licensing and enforcement against information society providers, a new right is needed. But how does this right look?

The new related right benefits press publishers (potentially including news publishers or news agencies) established in an EU Member State. It covers the online reproduction and making available of press publications by information society providers. The right is defined with reference to Articles 2 and 3(2) InfoSoc Directive, and subject to the exceptions in Article 5 thereof. However, it also has specific exclusions or carve-outs. In particular, it does not cover private or non-commercial uses of press publications by individual users, acts of hyperlinking, or the use of individual words and “very short extracts of a press publication”. These excluded acts remain subject to pre-existing rules in the *acquis*. Recital 58 justifies the exclusions on the basis that such acts do not impinge upon the investment protection rationale of the new right, but pushes (*in fine*) for a strict interpretation of the notion of “very short extracts”.

The press publishers’ right is recognised *in addition* to existing rights in respect of works/subject matter by other rights holders incorporated in press publications. The new right cannot be invoked against them and does not affect their independent exploitation. It lasts for two years after publication, counted as from 1 January of the year following publication (and only for press publications first published after 6 June 2019). An important characteristic of the regime is that it entitles authors of works incorporated in press publications to an “appropriate share of revenues” received by press publishers. How that share is defined and actualised will be a particular point of interest moving forward.

Will this new right achieve its objectives? Probably not. As [multiple studies](#) have argued, and failed experiences in Germany and Spain have shown, it is highly unlikely that the right will lead to positive outcomes. Rather, as many academics (including myself) have [warned](#) “considering current high levels of market concentration on online advertising markets and in media, a publishers’ right may well backfire: further strengthening the power of media conglomerates and of global platforms to the detriment of smaller players.”

The second provision in this chapter is **Article 16**. This introduces a claim for fair compensation for publishers. It applies to publishers in general, not just of press publications, but also of books, scientific publications and music publications. The provision is a legislative response to the *Reprobel* judgment, which had denied publishers a right of fair compensation under the reprography and private copying exceptions. The new provision explicitly *allows* Member States to recognise for publishers a claim to a share of fair compensation due to authors in the context of an exception or limitation. The claim is triggered in cases where authors have transferred or licensed to publishers a right to a work the use of which gives rise to such fair compensation.

Liability of User-Upload Platforms and “Upload Filters”*

The second chapter of Title IV contains the much-debated **Article 17**. (For previous coverage on this blog see e.g. [here](#), [here](#), [here](#), [here](#), [here](#), [here](#) and [here](#).)

At the outset, it should be noted that this provision is part of a broader policy push in the EU towards [increased liability or responsibility of online platforms](#), which comes largely at the expense of the prohibition of general monitoring obligations (Article 15 E-Commerce Directive) and individuals’ freedom to engage with content online. This push, already patent in the 2017 [Communication](#) and 2018 [Recommendation](#) on “Tackling Illegal Content Online”, has now materialised in Article 17 CDSM Directive, is very much a part of the proposal for a Regulation preventing the dissemination of terrorist content online ([currently at the trilogue stage](#)), and will presumably be a central part of the upcoming review of the E-Commerce Directive (or, as it is known in Brussels these days, the “Digital Services Act”).

Article 17 regulates “online content-sharing service providers” (**OCSSPs**). These are defined in Article 2(6) as platforms with a profit-making purpose that store and give the public access to a large amount of works/subject matter uploaded by their users, which they organise and promote. This includes well-known platforms like YouTube, Facebook or Vimeo, as well as any type of user-upload platform that fits this broad definition and is not expressly excluded in the provision’s non-exhaustive list of carve-outs.

Contrary to what is stated in Recital 64, the provision does not clarify existing law. Instead, it changes it by stating that OCSSPs carry out acts of communication to the public when they give access to works/subject matter uploaded by their users (see [here](#) on the complex case law on communication to the public). As a result, these platforms become primarily liable for their users’ uploads. They are also expressly excluded in paragraph (3) from the hosting safe harbour for *copyright relevant acts*, previously available to many of them under Article 14(1) of the E-Commerce Directive. Arguably, this makes Article 17 CDSM Directive *lex specialis* to the E-Commerce Directive. (It is also, in my view, *lex specialis* to Article 3 InfoSoc Directive.)

Such platforms then have two possibilities. First, they may obtain an authorisation to communicate/make available the content uploaded by users. The provision exemplifies with (direct) licensing from the copyright holder but leaves open other modalities of authorisation. These will at least include voluntary or extended collective licences (on which, see the [previously discussed](#) Article 12). If an authorisation is obtained, the same will extend to the “non-commercial” uploading users of OCSSPs.

However, it is easy to see that it will be nearly impossible to obtain all the required authorisations for the potentially millions of works uploaded by users, even with recourse to voluntary or extended collective licensing. This is especially true for types of content other than online music, where collective rights management is most developed as a matter of law and practice.

This design will therefore lead many OCSSPs to rely on the second possibility, which allows them to avoid liability if they meet a number of cumulative conditions, stated in a poorly drafted Article 17(4) (supported *inter alia* by an even worse Recital 66). They must demonstrate that they have: (a) made best efforts to obtain an authorisation; (b) made best efforts to ensure the unavailability of specific works for which the right holders have provided them with the relevant and necessary information; and (c) acted expeditiously, subsequent to notice from right holders, to take down infringing content and made best efforts to prevent its future upload. (The interpretation of each of these conditions would merit an independent post.)

During the legislative process, many commentators argued that the preventive obligations introduced by this article would not only be incompatible with existing directives, but also with the Charter of Fundamental Rights of the EU, as interpreted by the CJEU. In fact, for platforms to avoid liability and meet the conditions above they will have to deploy automatic content recognition technologies that examine all uploaded content. Despite the directive explicitly rejecting this outcome in Article 17(8), it is hard to see how these obligations will not lead to the adoption of “upload filters” and, ultimately, result in general monitoring. (That the provision will lead to filters has in fact been conceded by some EU officials and national governments).

Article 17 tries to avoid some of its negative effects in different ways.

First, in Article 17(5), by fleshing out a number of non-exhaustive factors (e.g. the type, the audience and the size of the service) that, together with the principle of proportionality, must be considered when assessing whether an OCSSP has complied with the obligations in paragraph (4). Only time will tell how these factors will be implemented into national law and interpreted by courts. Arguably, a serious consideration of the principle of proportionality in this context could go a long way in ensuring an application of this provision that is compatible with fundamental rights and avoid general monitoring.

Second, in Article 17(6), by excluding some of these obligations in regards to certain OCSSPs, namely if they are less than 3 years old, have an annual turnover below EUR 10 million, or do not exceed an average number of 5 million monthly unique visitors. I have not been able to find the evidence supporting these particular thresholds. In any case, the first condition alone will make this special regime little more than window-dressing.

Third, in Article 17(7), by including mitigation measures that would allow users to benefit from exceptions and limitations, in particular by creating a special regime for certain mandatory exceptions: quotation, criticism, review, caricature, parody or pastiche. Other posts will discuss the legal nature of these exceptions, which I believe to be akin to user rights. Here, it bears noting that, among its [various limitations](#), existing content recognition technologies are incapable of accommodating dynamic and context-specific exceptions. The result is that many otherwise lawful uses will be blocked (see [here](#)), contrary to the requirements of the Directive. It is furthermore unlikely that these concerns will be properly addressed by the required complaint and redress mechanisms for users mandated in Article 17(9), as such mechanisms are typically ineffective (see [here](#)), or by any of the rules described above.

Fourth, the provision states that the obligations it triggers will not lead to identification of users or the

processing of personal data, except in accordance with the ePrivacy Directive and the GDPR (see also Article 28). Still, serious concerns have been voiced to the contrary (see e.g. [here](#), [here](#) and [here](#)).

Finally, in a nod to the complexity of the regulatory framework Article 17 entails, the Commission is tasked with organising stakeholder dialogues to ensure uniform application of the obligation of cooperation between OCSSPs and rights holders and to establish best practices with regard to the appropriate industry standards of professional diligence. Certainly, the wording of the provision leaves some margin of discretion for interpretation. If properly exploited by the Commission and national legislators, that margin could be used to avoid some of the negative effects of this provision. In any case, Article 17 will surely keep Luxembourg judges and EU copyright academics busy for years to come. (Readers interested in exploring different interpretation options for Article 17 are invited to watch the [recording](#) of a recent event on this topic).

The real “value gap”: Exploitation Contracts for Creators

The final chapter of Title IV addresses *fair remuneration in exploitation contracts of authors and performers* (jointly: creators), with the exception of authors of computer programs. One could say it tackles the real value gap in the world of copyright. (For previous coverage of this topic on this blog see e.g. [here](#)).

First, **Article 18** sets out a *principle of appropriate and proportionate remuneration* for creators that license their works/subject matter. Recital 73 clarifies that a lump sum payment can constitute proportionate remuneration “but it should not be the rule”. The provision leaves Member States discretion on which mechanism to choose when implementing the principle, subject to conformity with EU law.

Second, **Article 19** lays down a *transparency obligation*. According to this, creators must receive on a regular basis – taking into account the specificities of each sector – detailed information on the exploitation of their works/performances from their licensors or transferors. This includes information on modes of exploitation, revenues generated and remuneration due. Subject to certain conditions, additional information may be requested from sub-licensees. The transparency obligation can be limited in cases where it is deemed disproportionate. In some cases, it can be set aside if the creator’s contribution to the overall work/performance is “not significant”. Furthermore, Member States may decide that transparency rules in *collective bargaining agreements* apply instead, provided they meet the criteria set forth in this article. Finally, collective management organisations (**CMOs**) and “independent management entities” are not subject to this transparency obligation if they are already subject to a similar obligation under Article 18 of the CRM Directive and national laws implementing it.

Third, **Article 20** entitles creators to a *contract adjustment mechanism*. They can claim “additional, appropriate and fair remuneration” from their counterparty (or its successors in title) if their initially agreed remuneration turns out to be disproportionately low as compared to the revenues generated by the subsequent exploitation of the works/performances by the contractual counterpart (Recital 78 provides some guidance on how to assess this). Importantly, the mechanism does not apply to agreements concluded by CMOs or “independent management entities”, as these are subject to national rules implementing the CRM Directive.

Fourth, according to **Article 21**, disputes concerning the transparency obligation and the contract adjustment mechanism may be submitted to a *voluntary alternative dispute resolution procedure*, which may be initiated by a CMO at the request of a creator it represents.

Fifth, creators have a *right of revocation* under **Article 22**. They may revoke in whole or in part an exclusive licence or transfer on the grounds of lack of exploitation of their work/subject matter, unless such lack is due to circumstances that the creator “can reasonably be expected to remedy”. The right of revocation can only be exercised within a “reasonable period” after the conclusion of the relevant contract, and the creator may opt for termination of exclusivity instead of revocation. The article identifies a number of factors national laws should consider if they set out *specific provisions for the revocation mechanisms*, including sector specificities, the relative importance of individual contributions in collective or joint works, as well as legitimate interests of other affected creators. In this context, Member States may even decide to exclude the application of the revocation mechanism altogether to works/subject matter that usually contain contributions from a plurality of creators.

Finally, any *contractual provision* that prevents compliance with Articles 19 to 21 – transparency obligation, contractual adjustment mechanism, alternative dispute resolution – is *unenforceable* vis-à-vis creators (**Article 23**). That is to say, these are mandatory provisions that cannot be derogated by contract, whether between creators and contractual counterparts, or those counterparts and third parties (e.g. in non-disclosure agreements, as noted in Recital 81). Conversely, it appears that contractual derogation from the right of revocation is possible. Still, Member States may choose to allow such a derogation to be enforceable only if based on a collective bargaining agreement (**Article 22(5)**).

Final Provisions and Next Steps

Title V contains the final provisions. These include amendments to the Database and InfoSoc Directives as regards safeguarding the application of the new mandatory exceptions in the CDSM Directive (**Article 24**), as well as a provision on the relationship with exceptions in other directives (**Article 25**). As regards application in time, the CDSM Directive will apply to works/subject matter protected by national law as from 7 June 2021, but without prejudice to acts concluded or rights acquired before that date (**Article 26**). In addition, exploitation agreements with creators are only subject to the *transparency obligation* in Article 17 as from 7 June 2022 (**Article 27**). Also, the processing of personal data carried out under the provisions of this directive must comply with the rules in the ePrivacy Directive and the GDPR (**Article 28**). As noted, it is not always clear how that will be possible, at least in the context of the preventive obligations in Article 17.

The CDSM Directive must be transposed into national law by 7 June 2021 (**Article 29**). The Commission must carry out its review of the directive no sooner than 7 June 2026. However, by 7 June 2024, it must carry out an impact assessment of the liability regime in Article 17 in relation to OCSSPs with an annual turnover below EUR 10 million and whose services have been available for less than three years. Depending on the conclusions of the assessment, the Commission must “take action”.

If any conclusion can be drawn from this *tour d’horizon* of the CDSM Directive, it is that national legislators have their work cut out during national implementations. For an instrument aimed at further harmonisation and promotion of legal certainty, the Directive leaves a significant margin of discretion to national lawmakers, either as a matter of design or as a result of ambiguous wording. Naturally, as we have seen in the past, some legislators may choose to implement a quasi-verbatim copy of the directive. Whichever the approach, it is likely that many of the issues raised in this and the previous post will ultimately make their way to the CJEU. It may take some years, but preliminary references are coming.

***The section on Article 17 of the CDSM Directive borrows from part of a forthcoming paper co-authored with Dr. Christina Angelopoulos.**