

# The New Copyright Directive: Online Content-Sharing Service Providers lose eCommerce Directive immunity and are forced to monitor content uploaded by users (Article 17).

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A key feature of the Copyright Digital Single Market Directive (DSMD) is the legal regime it provides for Online Content-Sharing Service Providers (OCSSP). These are, essentially, internet platforms storing and giving the public access to a large amount of copyright-protected works or other protected subject matter uploaded by their users, which the platform organises and promotes for profit-making purposes (Article 2).



Leaving aside the details, as relevant as they may be, the substance of Article 17 can roughly be summarized as follows: (i) the activity of OCSSPs is characterized by law as a "communication to the public"; (ii) OCSSPs are expressly deemed liable for unauthorized protected content available on their platforms unless a copyright exception or a liability limitation applies; (iii) the eCommerce Directive (ECD) safe harbour is declared to be inapplicable to those providers for the purposes of copyright; and (iv) OCSSPs are granted a new, *ad hoc* safe harbour exempting them from liability subject to a number of conditions which notably depart from the principles underpinning the ECD safe harbour.

Article 17 orders Member States to provide that an OCSSP "performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users." This characterization, only "for the purposes of [the DSMD]", can hardly be seen as a mere clarification of the scope of the right already provided for by the InfoSoc Directive. Arguably, the DSMD engages in a new, *ad hoc* definition of communication to the public, whose conditions are those laid down in the legal notion of OCSSP—some of which bear little or no relationship with the CJEU interpretation of communication to the public.

The uncertainty "about which online acts are considered 'communication to the public' (and therefore require authorisation by right holders), and under what conditions," was one of the elements the Commission had identified as an obstacle to closing the alleged value gap between right holders and platforms (COM(2015) 626 final, p. 9). Another was the platforms' claim that they are covered by the ECD safe harbour (*id.*, p.10). The DSMD resolved to get rid of both obstacles.

## Primary infringement and the hosting safe harbour

Characterizing OCSSPs' activities as an act of communication to the public or an act of making available to the public, and thus a primary infringement, was arguably meant to have the effect of depriving those providers of the ECD safe harbour. Indeed, it is largely understood that an activity amounting to a direct infringement necessarily falls outside the safe harbour's scope, which would only shelter from secondary liability. Arguably, however, this vision rests on a misunderstanding of the ECD's approach.

The ECD's hosting safe harbour—when its conditions are met—excludes the possibility of being held liable for hosting illicit content uploaded by users. While the safe harbour requires that the content is supplied by a truly third party—a party not acting under the authority or the control of the provider (see Art. 14(2) ECD)—it does not distinguish between direct and secondary liability. It exempts the liability that might accrue for hosting third-party illicit material, whatever the nature of such material, and regardless of how such liability is conceptualized by the relevant law. It is worth noting that the ECD's safe harbours are by no means copyright-specific. They cover any sort of liability, whether civil or criminal, certainly not just that arising from copyright infringement. And their effect is not limited to excluding instances of indirect liability; rather they shelter a specific activity regarding third party provided content irrespective of how the underlying material law—and the different national legal traditions, theories and case law—may happen to label it. (Even the copyright-specific US DMCA, which undoubtedly inspired the ECD, leaves no doubt about its scope: it covers direct, contributory and vicarious liability; see HR Report 105-796, at 73).

## Neutrality

A second argument commonly put forward appears to deem that an act amounting to a primary infringement will necessarily fail to meet the neutrality threshold set forth by the CJEU. Nonetheless, the threshold requirement of neutrality—leaving aside its problematic basis—is ill-suited to distinguish between primary and secondary infringements of copyright. None of the criteria suggested by the CJEU to find lack of neutrality coincides necessarily with those used by the Court to find direct infringement, particularly regarding the right of communication to the public, where the CJEU jurisprudence has been notably convoluted and unpredictable.

In addition, the fact of including in the definition of OCSSPs the elements of "organising and promoting" does not seem conclusive in this regard. Those are remarkably vague terms to begin with. The first one is not even that used by the CJEU, which refers to *optimizing* and promoting (*L'Oréal/LeBay*, 116). Moreover, the second paragraph of Art. 17(3) DSMD admits "the possible application of [the ECD hosting safe harbour] to [OCSSP] for purposes falling outside the scope of this Directive", clearly admitting that OCSSPs—who, by definition, organise and promote the content—may still be neutral enough to be sheltered by the hosting safe harbour where the liability does not relate to copyright but to other fields of law (for instance, defamation).

## Declaring the ECD safe harbour inapplicable

In a further acknowledgment that merely defining the OCSSPs' acts as communication to the public might not be enough to prevent the application of the hosting safe harbour, the DSMD simply states that it "shall not apply" to OCSSPs performing acts of communication to the public (Art. 17(3))—as noted, only for copyright liability. This is an outright limitation of the reach of the ECD, which is particularly surprising, as the DSMD chose not to amend the ECD. Specifically, Article 17(3) clashes with the horizontal approach followed by the ECD. This only adds to other legal initiatives, such as the *revision of the Audiovisual Media Services Directive*, which treat intermediary duties vertically, and somehow anticipates the reform of the ECD that the new EU Commission is likely to put forward.

## A new safe harbour

Regardless of labelling OCSSPs' acts as communication to the public, the DSMD acknowledges that some sort of limitation of liability is in order, since, after all, the content is not uploaded by the provider but by its users (see Recital 66). However, the conditions for the DSMD safe harbour have almost nothing to do with those laid down in the ECD, particularly regarding monitoring obligations.

First, unlike under the ECD, OCSSPs are liable in the first place, and thus failing to meet the conditions results in liability—whereas the ECD safe harbours do not assume the provider would necessarily be liable if it fails to meet the requirements. Second, unlike the ECD, which forbids general monitoring obligations, the DSMD establishes in practice active monitoring as an indispensable condition to be free from liability. Granted, this monitoring aims at detecting infringing content for which right holders have provided sufficient information. Still, it is arguably general monitoring anyway. OCSSPs are required to have "made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information" (Article 17(4)). High industry standards of professional diligence to achieve such a result implies intensive use of advanced content recognition technology. And the review should be general. It is not about removing content, it's about preventing its availability, which arguably requires checking out all uploads to make sure that not a single piece of infringing content informed by right holders makes its way to the platform (not that different from the situation in *Sabam/Netlog*, 36).

This is why Article 17(8) sounds very close to a mere political statement. Nonetheless, the Directive needs to be transposed, and some of the ambiguities and nuances of Article 17 may be clarified through the envisaged stakeholder dialogues and the guidance of the Commission. It remains to be seen whether Article 17(8) will be taken into account to assuage the actual monitoring the rest of Article 17 effectively imposes.

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