Kluwer Copyright Blog

The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part II

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Part I of this blogpost discussed the first paragraph of Article 17(7) DSM Directive, according to which the cooperation between online content sharing service providers (OCSSPs) and rightholders cannot render unavailable uploaded content which does not infringe copyright or neighbouring rights. Part II addresses the second paragraph of Article 17(7) which is instead addressed at the Member States.

Ensuring the availability of communicative limitations, but which ones?

The second paragraph of Article 17(7) obliges the Member States to ensure that users of OCSSPs are able to benefit from *existing* limitations – yet it only refers to two types:

"*a) quotation, criticism, review;*

b) use for the purpose of caricature, parody or pastiche."

Since there is no reference in the provision to Article 5 InfoSoc Directive, it is unclear whether point a) is intended to refer to Article 5(3)(d) of that Directive, which applies to "quotations *for purposes such as* criticism or review…" (including thereby all three concepts listed in point a), but requiring that the actual use of the content takes the form of a quotation), or whether it refers to any limitations under which either quotation, criticism, or review may be permitted (for example, Articles 5(3)(a) on use

for the sole purpose of illustration for teaching or scientific research, (c) on news reporting, (f) on use of political speeches and extracts of public lectures or content, (l) on use in connection with the demonstration of equipment). The strong focus on the entertainment sector during the legislative work on Article 17 has left other sectors on the periphery, making it unclear after the adoption of the final wording whether Member States must also ensure that users are able to create and upload other popular content, such as product unboxing videos, installation or use tutorials, or quotes from political speeches that are not necessarily for criticism or review, all of which may include quotation or be made for purposes of criticism or review, but do not necessarily fall within Article 5(3)(d).

The wording in the second category in point b) overlaps with the wording in Article 5(3)(k) InfoSoc Directive, from which it seems appropriate to infer that it refers to that provision/limitation.

The wording in both points makes no mention of limitations which may also be relevant, yet do not include quotations, criticism or review and are not parodies, such as the previously mentioned Article 5(3)(i) allowing incidental inclusion of content, or Article 5(3)(j) allowing use for the purpose of promoting public exhibitions or sale of artistic works. Accordingly, if point a) is in fact a reference to Article 5(3)(d), *all* other relevant limitations enumerated above are excluded from the obligation.

Fortifying two cherries in the basket?

Another aspect of the second paragraph of Article 17(7), given that it is directed to the Member States and seemingly imposes an obligation to ensure that users are able to benefit from certain limitations, is whether it in fact makes Article 5(3)(k) and, at least, Article 5(3)(d) *mandatory* to implement. Although a quotation limitation is mandatory under Article 10(1) Berne Convention, the Member States have approached parodies differently, with some Member States traditionally requiring that a parody be a work.

The wording in Article 17(7) is not conclusive, but recital 70 makes it abundantly clear that '*Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union*'. The only question that thus remains is which limitation(s) point a) actually refers to.

Complaint and redress mechanism

Article 17(9) requires Member States to ensure that OCSSPs introduce an *effective* and *expeditious* complaint and redress mechanism that is available to users of the services in the following cases:

- disputes over the disabling of access to content; and
- disputes over the removal of content which is uploaded by the users.

As mentioned in the earlier post, rightholders need to duly justify their requests to disable access to or remove content, and such requests shall be subject to human review. Moreover, the provision further requires the existence of, it appears additional, out-of-court redress mechanisms, which shall enable impartial settlement

of disputes. The need to underline the impartiality of those additional mechanisms seems to recognise, as I indicated in the previous post, that OCSSPs may not have any incentive to properly scrutinise whether uploaded content is non-infringing. Thus, actual dispute settlement may in fact really take place after an OCSSP's 'decision' is challenged by a user. Finally, the existence of these additional mechanisms should not prejudice access to a regular court in which users must be able to assert the use of a limitation. That ability may in fact enhance the position of limitations, which in legal proceedings often operate as defences to a claim of copyright infringement. But in the end this kind of institutional framework, like with any legal proceedings, may in practice only be available to those OCSSP-users who are prepared, legally and financially, to take up potentially long legal battles with giants and not to private individuals who in many cases do nothing more than upload funny or creative content. Without proper safeguards, disputes over the non-infringing status of content may in fact stop at the first tier administered by OCSSPs.

Article 17(7) and territoriality of copyright protection

The types of limitations on which Member States must ensure users can rely relate to limitations which enable the use of protected content for circumscribed purposes necessitating, to be fully effective, subsequent dissemination of protected content or parts thereof. By making Article 5(3)(k) and at least 5(3)(d) mandatory, the European legislator hopes to avoid the situation wherein content created under any of these limitations in one Member State will become infringing in another Member State where the limitation does not exist. Although the mandatory character of a limitation and the scope of a limitation are not the same thing, the concept of parody in Article 5(3)(k) has been held to be an autonomous concept of EU law (*Deckmyn*), for which reason a uniform treatment ought to be expected; reasonably this must also extend to caricature and pastiche. Nevertheless, it is for national courts of the Member States to determine whether the application of the parody limitation strikes a fair balance between the interests of rightholders and the freedom of expression of users (*Deckmyn*). That freedom may vary from one Member State to another. On the other hand, neither Article 5(3)(d) (quotation) nor (c) (news reporting) have been fully harmonised (*Spiegel Online*). In practice, therefore, the European legislator's attempt to make a few more limitations mandatory may not in fact significantly affect the fragmented approaches to limitations.

Territoriality raises another issue as well. What is communication to the public on one end is a temporary reproduction on the other end when uploaded content is actually accessed by consumers (when it is not accessed it is just a communication to the public; e.g. *Svensson*, para 19, *Filmspeler*, para 36, *Ziggo*, para 31). Given the scope of Article 17(7), the Member States need *not* ensure that consumers in each Member State are able to rely on the mandatory, consumptive limitation (Article 5(1)(b) InfoSoc Directive) which enables the viewing of content on the screen of a device, such as when a consumer connects to an online content sharing service to actually see the content. The limitation applies on condition that the temporary reproduction has no independent economic significance. The CJEU has made it clear that acts of reproduction which are carried out within the memory of a satellite decoder and on a TV screen do not have an independent economic significance, since they are not capable of generating additional economic advantage beyond the advantage derived

from the mere reception of a broadcast (*FAPL*, paras 176-178), in the Member State in which the content was legally available by other means. However, in contractual bargaining, it is a matter for the bargaining parties to convince one another that the assessment ought to be any different when content created and made available on the basis of a limitation in one Member State can be viewed by consumers in other Member States, for example in Member States in which the original work or subject-matter is not (yet) available at all. Since the ability to *view* content in all Member States need not be ensured, and the temporary copying limitation can be argued during negotiation not to apply, rightholders might be put in a position to have to provide authorisation for specific Member States for viewing non-infringing content made under a limitation.

Curiously, if such OCSSPs, which are today accessible to consumers without the payment of money, decide of their own volition to take advantage of their discretion in Article 6 of the Content Portability Regulation and verify their users' Member State of residence (for example on the basis of an IP address, Art. 5(k)) they will automatically benefit from the localisation rule in Article 4 and be able to make content accessible to individual consumers who temporarily visit another Member State without additional authorisation or licence costs, as these consumers will be presumed to connect from their Member State of residence.

Conclusion

It is an understatement to say that Article 17 is a compromise article. The legislative process has been demanding and tiresome for all parties involved. On the optimistic side, the adopted wording on limitations is much richer in content than the originally proposed Article 13(2), which simply referred to a redress mechanism. The European legislator has made two more limitations mandatory, but the true contribution seems to be the obligation hidden in the long text of Article 17(9), which requires Member States to ensure that users are able to assert the use of a limitation before a court. Perhaps this will include Article 5(1) InfoSoc Directive, though the evident focus lies on the communicative limitations.

The non-infringing status of uploaded content reflects many of the legislator's public policy choices. Those choices, especially with regards to the limitations, embody fundamental freedoms that make it possible to convey information and new ideas. In a democratic society, they are as necessary as copyright itself. Yet, although Article 17 tries to make OCSSPs European Judge Dredds, it simultaneously removes traditional safeguards that are capable of ensuring that they have the means to determine the status of uploaded content effectively, or even impartially, without fear of being sued for negligent, commercial, cross-border infringement of copyright. Even though the status of limitations is changing, and freedom of expression interests are expressly recognised in the recitals, it is difficult to escape the feeling that in some parts of the rhetoric embedded in Article 17 limitations are still nothing more than mere exceptions to a general rule.

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