The EU copyright directive and its potential impact on cultural diversity on the internet – Part I

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On July 6, the EU adopted the Directive on Copyright in the Digital Single Market (DSM Directive), following heated discussions of Articles 15 (formerly 11) and 17 (formerly 13) in particular. In Germany, tens of thousands of people took to the streets to demonstrate against the planned legislation in the lead-up to the vote in the European Parliament in March. Article 17 imposes much stricter liability on platforms such as YouTube. In the future, for example, these platforms will have to obtain permission from copyright holders for music videos uploaded by users. If they fail to do so, they will have to ensure that the content in question is not available on their service. The directive still needs to be transposed into the national legislation of the member states of the European Union by June 2021.

This post is divided into two parts, and outlines certain risks and opportunities in connection with the transposition process. Part I discusses the current position of host providers and the changes that will be brought about by Article 17. Part II will address the major problems in relation to Article 17 and how it should be implemented to minimize these.

The debates surrounding this EU copyright reform were heated. Article 17 in particular was heavily debated. Some argued the legislation would guarantee that creators could make money from their works. Others predicted the end of the internet or at least significant threats to fundamental freedoms on the net. Some politicians denigrated anxious citizen protestors as bots and purchased Google supporters. In reaction to the public uproar, the EU's copyright rapporteur, Axel Voss (CDU/EPD), was quick to announce that upload filters should be avoided when implementing the EU Directive.

Indeed, many serious mistakes could be made during the implementation of the directive into national law. Some of this legislation's major flaws can be corrected, however, and urgently need to be. Otherwise, the cultural diversity of the internet is at risk of being seriously impaired.

What is it all about? The host provider privilege

A fundamental principle concerning liability for rights infringements is that everyone is responsible for their own actions, and that one can only be held liable to a limited extent for the actions of others. This general rule also applies to the internet. Therefore, users are primarily liable if they post illegal content on platforms and hosting services. The providers of such services, on the other hand, are largely not responsible. Since they do not make, copy or upload any content, but only provide the technical facilities for the users to do so, they do not infringe copyright.

Platforms thus bear only a limited secondary responsibility for legal violations committed by their users. Above all, they must do what they do best: If they are alerted to infringements, they must stop them. Providers must block or remove illegal content when asked to do so. Their responsibility is therefore limited in principle to reactive behavior. This rule is called the host provider privilege or 'safe harbor', and it applies in a similar form throughout the liberal world. It was introduced in Europe in 2000 by the e-Commerce Directive (Article 14) and in the USA in 1998 by the Digital Millennium Copyright Act.

The effect of this allocation of responsibility is that user-generated content does not have to be proactively checked for infringements by service providers. The operators of user-generated content platforms, for example, have no reason to legally assess users' contributions before they are uploaded. Quite the contrary: According to the existing rules the less they know about the content in question the lower their liability. If they do not check the uploaded content they are only obliged to react to complaints submitted ex post facto by rights holders. Thus, they do not have to block or remove content on their own initiative.

According to Article 17 of the DSM Directive, however, platform providers shall be directly liable for copyright infringements committed by their users. The first paragraph states that when copyright-protected material is uploaded by a user, providers are held responsible for actively, i.e. of their own volition, making this material available. For this (fictitious) act of use, providers need to obtain their own permission (a license). If not in possession of such a license, a provider can be sued the very moment the material goes online.

This *primary* liability massively increases the legal risk for platforms. If they are directly liable for any and all illegal uploads, they must check all content before publication and block it if they consider it illegal.

This new EU approach is based on various false assumptions, which are discussed in detail below. To follow the argument, it is important to note that the decision in favor of Article 17 was based exclusively on a very specific constellation. The aim was to oblige very large and powerful platforms, in particular YouTube, to conclude license agreements with equally large and powerful companies from the entertainment industry, as well as collective rights management organisations (CMOs). The approach was mainly promoted by the music industry and CMOs in the music sector.

When exceptional circumstances are seen as the general rule

Ironically this is the one constellation where it has been common for years to work with content filters and licenses. YouTube has been concluding contracts with music companies and collecting societies for a long time. Its Content ID System gives rights owners the ability to manage their content, allowing them to ensure that content is either blocked or approved and monetized. Thus, a closer look at Article 17 reveals that it is not about YouTube paying the music industry and collecting societies in the first place. It is about YouTube paying more.

Focusing only on this particular constellation, the European legislator devoted itself to the following basic assumptions:

(1) It is possible for service providers to conclude licenses for any content that users publish on their platforms.

(2) It is always in the interest of the author or copyright holder to prevent any use that does not comply with copyright law (especially those for which they have not granted a license).

Both assumptions may apply to the alleged standard case of "YouTube versus music industry." However, Article 17 is by no means limited to this scenario. Rather, it comprehensively addresses the question of how to deal with copyright-relevant user content on all platforms. Looking at the context from this holistic point of view, both assumptions prove to be wrong and dangerous.

In principle, Article 17 requires platform providers to obtain licenses for user content, usually in exchange for a royalty. By acquiring a license, a provider can protect itself against liability risks. However, these licenses must be available *before* the licensed content is used, i.e. before it is made accessible on the platform.

The myth of comprehensive licensing for user-generated content

A comprehensive, preemptive clarification of rights cannot be achieved by any provider, for this would entail foreseeing any content users could possibly upload. Obviously, in view of the immense number of copyright protected works, this is per se impossible.

In addition, many rights cannot be clarified at all for practical reasons. For example, if there are no central clearing houses where all the necessary rights can be obtained (such as a CMO), licensing costs will increase immeasurably. Contrary to the assumptions made by the EU legislator, music is not at all a prime example in this respect. For the vast majority of content, there are neither CMOs nor central licensing bodies that could grant all the necessary rights. This applies, for example, to texts, films, photos or computer games – in short, to billions of copyright protected works.

In the absence of a central "one-stop shop" for licensing, platform providers would have to conclude individual contracts with thousands, perhaps millions, of authors and rights holders in order to clarify all conceivable rights applicable to user-uploaded content. And even if this effort could conceivably be undertaken, there would be countless cases where the rights could not be obtained for other reasons, e.g. because it is not clear who owns them, because the rights holder no longer exists (publishers go bankrupt or close for other reasons), because the author cannot be found, etc.

In other words, all-encompassing licensing for all user content on platforms is an unobtainable ideal, a myth. In countless millions of cases no rights can be obtained, even with the most complex licensing efforts.

Illegal content for the common good

The logic of the DSM Directive effectively requires that platform providers prevent non-licensed content from ever being put online. This content must be filtered and blocked. Since they otherwise expose themselves to incalculable liability risks through legal proceedings, providers have no other choice. Because manual checks of mass user content are simply impossible, "upload filters" must be used. This refers to algorithms that distinguish between legitimate and illegal uploads. What they do not recognize as licensed or at least obviously legal they will block or delete.

This reality is embedded into Article 17's DNA. The approach is based on the second of the above misconceptions. The European legislator appears to assume that copyright infringements are always undesirable and that there is always an interest in stopping them. Again, this may be true as regards the relationship between the music industry and YouTube. However, from a holistic point of view, this assumption also proves to be wrong.

Copyright law is very extensive. It often prohibits even the most minor uses of third-party material in one's own publications. This legal situation very often contradicts the interests not only of the user but also of the rights holder himself.