

# European Copyright Society's (ECS) Comments on the implementation of the CDSM Directive in Member States - Part II (Liability of Platforms and Creators' Contracts)

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The European Copyright Society (ECS) has issued a series of insightful Comments on the implementation of the CDSM Directive's provisions, which aim to serve as guidelines for policy options for the implementation of the Directive in the Member States. Part I of this post outlined the Comments on the implementation of Articles 8 and 12, and 14. This Post will focus on the Comments on the implementation of Articles 17 and 18-22.



## Comment on the Implementation of Article 17 of the CDSM Directive ("Use of protected content by online content-sharing service providers")

The ECS's Comment addresses certain of the core aspects of the hotly debated Article 17 that may play an important role in the national implementation process. First, with regard to the concept of online content-sharing service providers (OCSsPs), the ECS suggests that Member States implementing Articles 2(6) and 17 should make clear in their legislation or in the official memorandum that online sharing services that do not organise and promote the materials uploaded by their users are not held liable for copyright infringement in accordance with Article 17(1). (4). Since the level of control and advantages taken from the uploaded content are much less intensive for those services than for OCSsPs, Member States should continue to apply the general rules for secondary liability combined with a notice-and-take-down approach.

Another important question is what is meant by best efforts to ensure the unavailability of works according to Article 17(4)(b) CDSM. In the opinion of the ECS, based on the final wording of Article 17(4)(b), Member States will be well advised to implement a technology-neutral provision which may include filtering technologies as long as they represent the best efforts and high industry standard of professional diligence, but which also allows courts to oblige OCSsPs to use different technical (or other) means once they are available on the market. The ECS emphasises that Article 17 also concerns certain measures to preserve breathing space for forms of user generated content (UGC) that may be qualified as "transformative" in light of the creative input which the user added to pre-existing third-party content. Article 17(7) CDSM underlines the need to safeguard copyright limitations for creative remix activities, in particular use for the purposes of "quotation, criticism and review," and "caricature, parody and pastiche". Member States may consider the possibility of combining the implementation of the CDSM Directive, in particular Article 17(7), with the introduction of a broader "pastiche" limitation covering a wider spectrum of UGC. If a broad limitation infrastructure for UGC - based on the open-ended concept of "pastiche" - is combined with the payment of equitable remuneration, Article 17(7) CDSM will also generate new revenue streams that support the general policy objective of the new EU legislation to close the so-called "value gap".

With regards to procedural safeguards for the benefit of users who are confronted with unjustified content blocking, it is advisable to make the submission of a complaint against content filtering as simple as possible and avoid providing for potentially lengthy procedures for clarifying the status of the user generated content to the detriment of freedom of expression and information.

Additionally, Member States should consider implementing direct remuneration claims for authors and performing artists which guarantee that the creative persons receive a fair share of the expected additional revenues obtained by rightholders under Article 17 of the CDSM. The Directive does not foresee such claims but tries to strengthen the position of authors and performers by contractual means under Article 18-23 of the Directive. Nevertheless, experiences with existing national legislation in this area show that it is doubtful whether these contractual means will suffice to redirect the revenue streams at least partly to the creative workers.

## Comment on the Implementation of Articles 18-22 of the CDSM Directive

With regard to the contractual law provisions of the CDSM Directive, the ECS welcomes the protection that Articles 18-22 offer to authors and performers in their contractual dealings with economic actors to whom they transfer or license their rights. The ECS advises the Member States to give full force and efficiency to this part of the Directive.

As to individual articles, the ECS recommends:

**Article 18 - Right to an appropriate and proportionate remuneration:** "Appropriate" and "proportionate" are two distinct elements of the remuneration to which authors and performers are entitled. Proportionate refers to a percentage of the actual or potential economic value of the rights and constitutes a principle that may be substituted by a lump sum only under strict and limited conditions. Sectoral collective bargaining agreements could help better define the factors of a fair remuneration and the limited cases where a lump sum could be admitted. The ECS notes that Member States may achieve the principle of an appropriate and proportionate remuneration by other mechanisms, such as the granting of unwaivable rights of remuneration.

**Article 19 - Transparency obligation:** Authors and performers are entitled to receive relevant information necessary to ascertain the revenues yielded by the exploitation of their works, which should comprise all revenues generated, all financial flows between exploiters as well as expenses incurred. The ECS underlines that Member States should consider the issue of sanction, should the transferees or licensees not comply with their obligation to provide the required information. In addition, the ECS welcomes the possible extension of the transparency obligations to sublicensees when necessary, including to obtain information about the revenues generated by Internet platforms exploiting creative content.

**Article 20 - Contract adjustment mechanism:** The ECS is of the opinion that the contract adjustment mechanism is broader than a best-seller provision, where the remuneration can be readjusted in case of unforeseen commercial success of a work. Instead, authors/performers should be entitled to receive an additional, appropriate and fair remuneration in any situation where the originally agreed-upon remuneration is disproportionately low compared with all the subsequent relevant revenues derived from the exploitation of the works or performances.

**Article 22 - Revocation right:** The Directive conditions the right for authors/performers to claim back their rights from their counterparty upon the lack of exploitation of rights they have acquired. To ensure a better and more efficient protection of authors and performers, Member States are advised to broaden the scope of the right of revocation so that it can operate in cases of partial exploitation that do not meet the customary standards of the sector concerned. However, as the revocation might be a problematic and risky option for authors and performers, other possibilities, such as a right to revise the contract on a regular basis, may be provided by Member States.