Kluwer Copyright Blog

Article 17 of the Copyright Directive: Why the German implementation proposal is compatible with EU law – Part 1

Martin Husovec (London School of Economics) and João Pedro Quintais (Institute for Information Law (IViR)) · Wednesday, August 26th, 2020

In a recent two part post on this blog, our esteemed colleagues, Jan Bernt Nordemann and Julian Waiblinger, argued that our 2019 working paper and the German implementation proposal reading of Article 17 Copyright in the Digital Single Market (CDSM) Directive are wrong when they treat that entire provision as *lex specialis* to Article 3 InfoSoc Directive. (Notably, in a recent consultation document, the European Commission also views Article 17 as *lex specialis*.) Instead, Nordemann/Waiblinger argue that only *components* of Article 17 are a special case. For the rest, the Member States have to obey a different directive, the InfoSoc Directive. The debate has far-reaching consequences. Among them, as we explain below, is the determination of whether a new exception to Article 17 in the German implementation proposal is compatible with EU law. In this two-part blog post, we explain why Nordemann/Waiblinger's argument is unconvincing as regards the qualification of the right in Article 17 (Part 1) and why the German implementation proposal is in fact compatible with EU law (Part 2).

The heart of Nordemann/Waiblinger's argument is that Article 17 is a sub-right of the general communication to the public right in Article 3 InfoSoc Directive. They

recognize that "the legal liability rules of Art. 17… take precedence over the rules of Art. 3 InfoSoc Directive". But in their view, "from an *exploitation rights perspective*, Art. 17(1)… does not have any distinct meaning compared to Art. 3 InfoSoc Directive". Even more, "Art. 17… relies on the application of Art. 3 InfoSoc Directive and its wording adopts the (exploitation rights) definition of communication to the public". And lastly, "[i]f Art. 17… were to create a *sui generis* right of communication to the public, it would not "*leave intact*" and "*in no way affect*" the provisions of the InfoSoc Directive as proclaimed in Art. 1(2) DSMCD".

What Article 17 is and is not

Let us examine the components of the argument.

We should perhaps first recall that Article 17 introduces a right that:

- is included in a separate directive that claims to solve a particular industry problem (Chapter 2),
- uses its own legal definition and exclusions to trigger its application (Article 2(6)),
- foresees its own set of circumstances which lead to non-payment of licensing fees (Article 17(4)),
- explicitly amends the InfoSoc Directive, when it comes to some exploitation acts of *users* whose non-commercial acts cannot be subject to a separate license under some circumstances (Article 17(2)),
- explicitly amends the InfoSoc Directive, by mandating some exceptions and limitations regarding *users'* acts of exploitation that are optional under the InfoSoc Directive (Article 17(7))
- bears the same name as the right under Article 3 InfoSoc Directive – "right of communication to the public".

In our paper, we argue that the right in Article 17 CDSM Directive is either a special right or a new *sui generis* right. In simple terms, a special right would mean that although the scope of acts it covers is *within* the pre-existing scope of the right of communication to the public in Article 3 InfoSoc Directive, it follows a separate regime with its own particular rules. Conversely, a new sui generis right would mean that it amounts to a wholly new right of communication to the public, which extends the concept beyond the already broad EU notion of the communication to the public in Article 3 InfoSoc Directive as interpreted by the CJEU.

Both readings are based on the understanding that Article 17 *as a whole* is *lex specialis* to the InfoSoc Directive, meaning that it exclusively governs all the specific subject matter and circumstances it regulates, which were previously subject to the InfoSoc Directive. In their posts, Nordemann/Waiblinger single out the *sui generis* nature qualification of the new right, probably because that terminology is used by the German proposal. However, in terms of outcome, it does not much matter whether the right is special or *sui generis*. The material consequences are the same. In both cases national legislators have a broader margin of discretion when implementing Article 17 than they would have if the provision was subject to the rules on rights and exceptions in the InfoSoc Directive.

Nordemann/Waiblinger develop another approach. They argue that although some parts of Article 17 are *lex specialis*, the provision *as a whole* is not. As a result, the margin of discretion of national legislators would be much more restricted than under our interpretation.

The problem is: you cannot divorce the different parts of an article from each other. The right in Article 17(1) and the liability exemption mechanism in Article 17(4) do not operate independently. They are the constituent parts – scope, enforcement, exceptions – of the same complex legal provision merged into a unitary legal regime. If you doubt this, just consider the constitutionality of Article 17(1) absent 17(4) or other parts of the provision.

Nordemann/Waiblinger claim that there is a conceptual difference between the exploitation and enforcement (intermediary liability) perspectives. While they accept that the new provision changes the law as regards enforcement, they argue that nothing changes as regards exploitation. If this were true, why is direct liability (and the requirement of authorization) attributed only to a particular subset of hosting service providers, namely those meeting the criteria of Article 2(6) CDSM Directive? Why are the communication to the public criteria under the general case law suspended from application in the area of Article 17(1) and instead partially integrated in the criteria for the assessment of what constitutes an OCSSP in Article 2(6) and Recitals 62-63? Why are start-ups and the like excluded at all? And why is it that under the conditions of the liability exemption mechanism in Article 17(4) some OCSSPs will not have to obtain authorization and pay the applicable remuneration for this right?

Nordemann/Waiblinger further note that the CDSM Directive states that the InfoSoc Directive shall be left intact, except for a specific explicit formal amending provision in Article 24. But they also accept that Article 17(2) and 17(7) introduce explicit changes. Even they admit that despite their "intact claim", the new Directive indirectly amends the InfoSoc Directive. In our view, that statement in the CDSM Directive merely means that it shall not horizontally amend the InfoSoc Directive; this view is reinforced by Article 25 on the relationship with exceptions and limitations in other directives. If this were not the case, how can the new directive introduce Article 17(1), (3), (4), (5), (6) and (7), which all amend the InfoSoc Directive?

In legal interpretation methods we know that the legislator can claim many things (such as that it only clarifies the existing law), but that the newer special rule *always* overrides the earlier general rule, even if the law does not state this. We primarily care about the content of rules, what the law does, not what the legislator says it does.

Nordemann/Waiblinger claim that unless the CDSM Directive explicitly says so, the Member States are *not* allowed to introduce exceptions unforeseen by the text of Article 17. However, what is the legal basis of this claim? Any directive introducing a separate exclusive right which does not foresee exact exceptions simply leaves that matter to the discretion of Member States, with the condition that they respect the *effet utile* of that directive. That is the very point of directives, which have to be transposed into national law. The Member States do not need explicit permission and the EU only harmonizes/coordinates some selected aspects by means of directives.

Arguing that the silence of the directive on the topic automatically pre-empts any exceptions is contrary to the nature of the EU instrument itself.

In that light, we interpret Nordemann/Waiblinger's argument to be that Article 5 InfoSoc Directive constitutes an explicit prohibition to the recognition of new exceptions *in another directive* (the CDSM Directive). However, as explained, you cannot have both a *lex specialis* that goes beyond the InfoSoc Directive and is simultaneously governed by the same rules. The InfoSoc Directive does not set a limit to all other directives, nor does it attempt to do so, as is clear from the wording of its Article 5. As we see it, in the CDSM Directive, the EU legislator decided to go for a *lex specialis* regulation of OCSSPs by partly excluding them from the scope of the InfoSoc Directive framework.

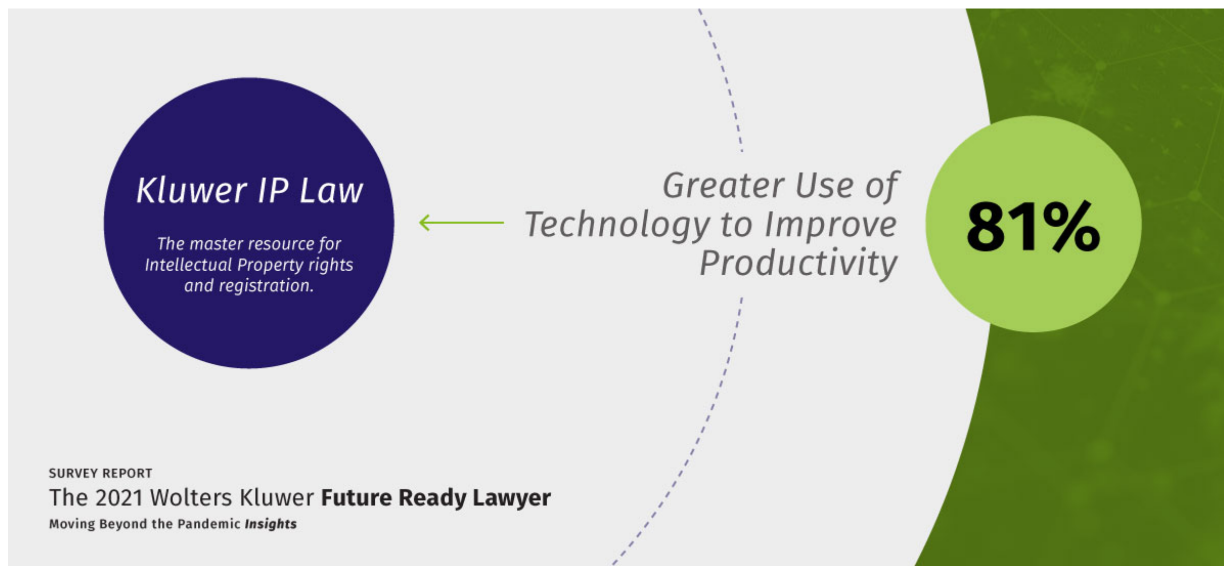
Building on the analysis above, the second part of this post argues why the German implementation proposal is in fact compatible with EU law and why objections to it are unconvincing.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

Kluwer IP Law

The **2021 Future Ready Lawyer survey** showed that 81% of the law firms expect to view technology as an important investment in their future ability to thrive. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



Kluwer IP Law

This entry was posted on Wednesday, August 26th, 2020 at 2:22 pm and is filed under Communication (right of), Copyright, Digital Single Market, European Union, Germany, Legislative process, Limitations
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.