Article 17 of the Copyright Directive: Why the German implementation proposal is compatible with EU law – Part 2

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In Part 1 of this blog post we addressed certain criticisms from our esteemed colleagues Jan Bernt Nordemann and Julian Waiblinger to our 2019 working paper and the German implementation proposal of Article 17 of the Copyright in the Digital Single Market (CDSM) Directive. In this Part 2, we argue why the latter proposal is in fact compatible with EU law and why objections to it are unconvincing.

Why the German implementation proposal is correct

In our 2019 paper we concluded the following:

- The right in Article 17(1) exists in its own special regime, either because it is a "special right" in relation to Article 3 InfoSoc Directive , or because it goes beyond that provision, constituting a "new *sui generis* right". Under both interpretations, licensing of the right in Article 17(1) is *unconstrained* by the pre-existing general framework of EU copyright law, and is only limited by the *effet utile* of the CDSM Directive.
- Practical consequences of the above interpretation are, however, limited by the fact that restricted/exploitation acts by OCSSPs under Article 17(1) presuppose a restricted act by users, covered by Articles 2 and 3 InfoSoc Directive.
- At the same time, the special rule of Article 17(2) automatically extends any authorisation concerning the right in Article 17(1) (including, eventually, those stemming from the statute) to users acting on a predominantly non-commercial basis. This causes the licensing of users' restricted/exploitation acts to follow the arrangements for OCSSPs in these circumstances. Beyond such non-commercial situations, no licensing extension takes place, meaning that users do not benefit from the licensing arrangements for OCSSPs.

The German Ministry proposed to make use of the flexibilities in the EU legal framework, which we have highlighted throughout our paper. Specifically, Sections 6 and 7 of the German proposal include a new type of limited remunerated exception to the right in Article 17(1) of the directive, which is subsequently extended by means of Section 9 to accompanying exploitation acts of a non-commercial nature by end-users.

Section 6 of the German proposal (on "Mechanically verifiable uses authorized by law") provides for the following new exception:

(1) The communication to the public and the reproduction required for this purpose of copyright-protected works and parts of works for non-commercial purposes is permitted to the following extent: [1] up to 20 seconds of an individual film or motion picture, [2] up to 20 seconds of an individual audio track, [3] up to 1 000 characters of an individual text and [4] an individual photograph or an individual graphic with a data volume of up to 250 kilo-bytes.

(2) Paragraph 1 shall only apply if there is no contractual right authorizing uses according to paragraph 1 and it is not a use authorized by law according to§ 5.

Section 9 (on "Extension of authorisations"), the national implementation of of Article 17(2) CDSM Directive, then extends the licenses as follows:

(1) If the service provider allows the communication to the public and the reproduction of a work necessary for this purpose, this permission also extends to the user, provided that the user is not acting commercially or is not generating substantial income.

Although Section 6 does not articulate this expressly, it concerns the acts restricted by Article 17(1) CDSM Directive. Hence, Section 6 of the German proposal is an exception to the national provision implementing Article 17(1) of the directive (i.e. Section 1 of the proposal). The criteria of Section 6 only limit the liability of users where the requirement of predominantly non-commercial use is met. Since the restricted/exploitation acts in Section 6 refer to users' uploaded content, the reference to "non-commercial purposes" is a reminder of this. The exception is remunerated, and applies only if there is no other exception or license available (see Section 7 of the proposal). Section 9, in compliance with Article 17(2) of the directive, then extends the corresponding *ex lege* authorization to users. This means that the construction of the exception conforms to the criteria that we outlined earlier. Therefore, in our view, this design makes the proposed German exception compatible with the requirements of the CDSM Directive. Still, since the publication of the German proposal two sets of objections have been voiced as to why the German proposal is incorrect. Let us examine them in succession.

Is the right in Article 17(1) CDSM Directive constrained by the InfoSoc Directive?

This objection is essentially the one that Nordemann/Waiblinger raise and that we have addressed earlier. It says that arranging any exceptions by law would be contrary to Article 5 InfoSoc Directive. As explained, it assumes that you can break Article 17 into pieces and only assess different components separately as potential changes to the pre-existing framework. The problem with this interpretation is that the different components are barely separable, and are instead built as a single tool – Article 17. This single tool has its own scope, set out in Article 2(6), which demarcates it as *lex specialis*.

As stated above, Article 17(1) remains limited by the *effet utile* of the CDSM Directive itself, but not by mechanisms of other directives, which are not incorporated into it. It is a fundamental feature of an EU directive that the Member States have a margin of discretion in its implementation, provided they respect its own provisions and its *effet utile*.

Moreover, without the possibility of carving out exceptions to the right in Article 17(1), even mirroring users' regular 'InfoSoc' exceptions, which are not included in the list of Article 17(7) (e.g., for research or education purposes), does not have a legal footing (Recital 69 is limited to explicit authorizations of users). Article 17 simply does not foresee many other exceptions, such as research or teaching exceptions, known from Article 5 InfoSoc Directive; and these cannot be simply transposed by analogy, as OCSSPs do not engage in these activities, but only facilitate them for their users.

The last-resort argument of potential fragmentation is also used by Nordemann/Waiblinger, who say that "if every Member State could decide whether (or not!) to introduce such an exception and its scope, harmonisation of exceptions and limitations would remain an uncompleted endeavour. This was not the intent of Art. 17 DSMCD".

First, any national exceptions are limited by *effet utile*, and by the fact that users' restricted/exploitation acts remain covered by the pre-existing framework. These two limits make it clear that any national exception can make a practical difference *only* as long as it can extend to users by means of Article 17(2), which is severely limited by its restriction to predominantly non-commercial uses. Any other exception arranged by the legislator for the right in Article 17(1) would simply not extend to users. Without such an extension to users, exceptions would be effectively useless. Therefore, arguing that this would severely fragment the Digital Single Market, and undermine the goals of harmonization, appears overblown. This is particularly true when one considers other aspects of Article 17, which are much more likely to fragment the Digital Single Market. Besides, the very same optionality of the InfoSoc Directive exceptions has until this date been accepted as entirely justified (even if regularly criticized by scholars), despite the grand goals of that directive.

Does Article 25 of the CDSM Directive impose a limit?

Some authors moreover point out that Article 25 CDSM Directive, on the "relationship with exceptions and limitations provided for in other directives", allegedly constrains new exceptions. This article provides that: "Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in Directives 96/9/EC [*Database Directive*] and 2001/29/EC [*InfoSoc Directive*], for uses or fields covered by the exceptions or limitations provided for in this Directive." Some authors argue that Article 25 means that *any* exceptions in the CDSM Directive have to be compatible with – meaning subject to the rules of – the InfoSoc Directive. But this argument is unconvincing.

First, the provision imposes a compatibility test only to the extent that a new or adapted exception would apply to the scope of an exclusive right as determined in the InfoSoc Directive. As we have argued, that is not the case for the new Article 17(1) right.

Second, looking at the legislative process, Article 25 was drafted with reference to the new exceptions introduced by the CDSM Directive in Title II, Articles 3 to 6 on text and data mining, cross-border teaching and preservation of cultural heritage. Its goal was to emphasize that the CDSM Directive should not limit the possibility for Member States to "adopt or maintain" other exceptions covering the same uses, which are provided by the pre-existing InfoSoc and Database Directives (see also Article 24 and Recitals 4 and 5 CDSM Directive). In other words, new provisions in the CDSM Directive should not narrow down pre-existing exceptions for research or education purposes. After all, the CDSM Directive is *lex specialis*, isn't it? Hence the wording "compatible" with those directives.

Therefore, in our view, it is clear that Article 25 is intended to apply to the new exceptions in Title II. Arguing the opposite not only ignores the language of the directive but implies that *any limitation* to the CDSM Directive has to be compatible with the two directives. This would have significant consequences for the maneuvering space of the Member States when it comes to defining concepts such as "best efforts", "prevent" and "proportionality", as in the end they all limit Article 17. It would essentially lock in the entire provision in the form adopted by the EU legislator. This would be problematic because the CDSM Directive obviously does not even remotely consider all novel issues it raises. This would also be contrary to the intention of the legislator to leave the possibility for Member States to adapt some of the rules in Title IV, as is made clear from the text of the provisions and the recitals, and the very logic behind the Commission Stakeholder Dialogues mandated in Article 17(10).