# Top 10 Posts on the Kluwer Copyright Blog in 2020

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Kluwer Copyright Blogger

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As we enter a new year, we would like to take this opportunity to pass on our best wishes for 2021 to all of our readers, as well as reflect on developments in copyright over the past year.  Despite its challenges, last year was another busy one in the copyright world, with ongoing European copyright reform, a number of landmark CJEU decisions and notable developments in a number of jurisdictions.

Here is a quick look back at our 10 most read posts last year:

**1.** CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work by Paul Keller

*On Tuesday, November 10, the Court of Justice of the European Union (CJEU or Court) heard case C-401/19. This case is a request by the Polish government to annul the filtering obligation contained in Article 17 of the Copyright in the Digital Single Market (DSM) Directive on the grounds that it will lead to censorship and will limit the freedom of expression and the freedom to receive and impart information guaranteed in Article 13 of the EU Charter of Fundamental Rights (Charter).*

*This post details the arguments made by the parties and the questions posed by the Court at the hearing.*

**2.** Article 17: What is it really good for? Rewriting the history of the DSM Directive – Part 1 by Julia Reda

*EU Member States are currently grappling with the task of implementing the Directive on Copyright in the Digital Single Market (DSM Directive) into national law. The European Commission is preparing its guidance to help national legislators make sense of its most controversial part, Article 17. These legislative developments have prompted a series of remarkably similar statements from rightsholders' interest groups, attorneys and academic commentators about the nature and purpose of Article 17. Part 1 of this blog post put rightsholders' claims that Article 17 is a "clarification" of the existing right of communication to the public into historical context. Part 2 went on to show that this claim has no basis in the legislative text of Article 17.*

**3.** The EU copyright directive and its potential impact on cultural diversity on the internet – Part I by Till Kreutzer

*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 outlined certain risks and opportunities in connection with the transposition process. Part I discussed the current position of host providers and the changes that will be brought about by Article 17. Part II addressed the major problems in relation to Article 17 and how it should be implemented to minimize these.*

**4.** 'Shape of You' – has Ed Sheeran got form for copyright infringement? by Hugo Cox

*Ed Sheeran's 'Shape of You' was a giant hit of the last decade, a runaway success story – well almost. There is a fly in the ointment. Sami Chokri (a.k.a. Sami Switch) is claiming Sheeran and his fellow songwriters infringed his copyright, copying part of the chorus of 'Oh Why'.*

*In order to support his claim Chokri wished to plead evidence of Sheeran copying other songs. This is to prove Sheeran and his collaborators were in the habit of appropriation. The logic is if Sheeran can be shown to have infringed on other occasions, then it would be more likely he would infringe again. A judgment on 9 December, Sheeran & Ors v Chokri & Ors [2019] EWHC 3584 (Ch), allowed Chokri to bring in these arguments, though did not rule on whether they are made out.*

**5.** Article 17 stakeholder dialogue: What we have learned so far – Part 1 by Paul Keller

*At the start of 2020, the European Commission's stakeholder dialogue pursuant to Article 17 of the Directive on Copyright in the Digital Single Market (DSM directive) entered its third phase. After four meetings that focussed on gathering "an overview of the current market situation as regards licensing practices, tools used for online content management […] and related issues and concerns", the next two (or more) meetings would finally deal with issues raised by the provisions in Article 17 of the CDSM directive. According to the Commission's discussion paper for the meetings of 16 January and 10 February 2020, the objective of the third phase "is to gather evidence, views and suggestions that the services of the Commission can take into account in preparing the guidance pursuant to Article 17(10)".*

*In advance of those meetings, Parts 1 and 2 of this post recapitulated what we have learned since the stakeholder dialogue kicked off in October of 2019.*

**6.** Regulatory divergence post Brexit: Copyright law as an indicator for what is to come by Martin Kretschmer

*In response to a parliamentary question by Labour MP Jo Stevens, Intellectual Property Minister Chris Skidmore said on 21 January that the UK Government had no intention of implementing the EU Copyright Directive, for which the UK Government had voted in the EU Council in spring 2019. There was significant dissent among EU Member States and the Directive would not have been adopted without the UK's support.*

*Does this matter? Copyright law may not be what people expected to be the first post-Brexit regulatory fault line. The public debate has been dominated by standards for labour, the environment, public subsidies and taxation, where the EU's concern is regulatory dumping. Yet Brexiteers have said many times that leaving the EU only makes sense if it leads to the UK becoming a more attractive destination for business. This means entering into a process of regulatory competition with its closest neighbouring market. So it is advisable to pay close attention to how this negotiation will play out. And copyright law is where the choices start.*

**7.** Why Metadata Matter for the Future of Copyright by Martin Schaefer

*The legislative agenda of the past two decades – both in Europe and further afield – has been about adapting copyright to the requirements of the information society. The administrative means to make use of those new opportunities by licensing at the right source and allocating revenues to the right recipients, in a world of interactive and intertwined content, have not been harmonised at the same pace. In the copyright industries of the 21st century, metadata are the grease required to make the engine of copyright run smoothly and powerfully for the benefit of creators, copyright industries and users alike.*

*This post discusses a proposed metadata search and enhancement tool that could constitute a buffer that safeguards the interests of the various proprietary database owners. They want to keep out intruders who are simply interested in freeloading from their stock of information. That is what the new approach can achieve. Instead of allowing everyone to look into everyone else's metadata stocks (and to blatantly copy from them), it would be a central trustworthy system operating a new search tool that conducts searches in all databases connected to it, ranking the data based on a highly sophisticated yet transparent algorithm.*

**8.** Copyright law trapped in the web of hyperlinking: the AG's Opinion in the VG Bild-Kunst case (Part I) by Tatiana Synodinou

*On September 10, 2020 the Advocate General (AG) Maciej Szpunar delivered his Opinion on the case of VG Bild-Kunst v Stiftung Preußischer Kulturbesitzanother (C-392/19), a further case concerning the legality of linking. The assessment of linking from an EU copyright law perspective appears to be a labyrinthine legal exercise, since, following the seminal Svensson (C-466/12) and GS Media (C-160/15) decisions, several factors have to be taken into account such as the initial lawful communication of the linked work, the application of access restrictions, the actual or constructive knowledge of the linker regarding whether the work has been initially communicated with the author's consent, and the profit making activity of the linker. Despite the CJEU's efforts to provide clarity on the issue, there are still some questions which have remained unanswered, such as whether contractual or licence restrictions should also be taken into account in order to conclude that content is not freely available on the Internet and whether the specificities of each linking technique should also be considered. The AG's Opinion focuses on the latter question.*

Part II is available here.

**9.** Copyright vs data protection: CJEU grappling with the right to information about infringers by Giulia Priora

*On 9 July 2020, the Court of Justice of the European Union (CJEU) delivered its judgment in Case C-264/19 Constantin Film Verleih v YouTube and Google Inc. Providing clarification on the scope of the copyright holder's right to information, the CJEU decided that the notion of "address", as set in Directive 2004/48/EC (Enforcement Directive), does not encompass IP addresses, email addresses and phone numbers of online users, unless otherwise specified by national law.*

**10.** Article 17 of the Copyright Directive: Why the German implementation proposal is compatible with EU law – Part 1 by Martin Husovec

*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, 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).*