

Kluwer Copyright Blog

Council's proposal for article 13: what about press freedom?

Jan van Vegchel (University of Amsterdam (IViR)) · Wednesday, August 22nd, 2018

As the endgame for the negotiations on the long-awaited new European Directive on copyright in the Digital Single Market is finally on, the debate focuses very much on article 13 of the proposed directive. A lot has been published already about the consequences of this proposal for the future of 'the-internet-as-we-know-it', but what are its effects on the use of social platforms by the professional media?

Let us look at the situation in the Netherlands. Social platforms are the newest vehicle of communication for Dutch media companies. Their importance is significant. In 2017, the public news broadcaster *NOS* had 724,000 'friends' on its Facebook news account, 998,000 followers on its Twitter account and 211,000 Instagram members. Nearly 43,000 viewers subscribe to its [YouTube channel](#). Sharing, a distinctive feature of social media, multiplies that reach. Print has also discovered social networks. The second biggest newspaper, *Algemeen Dagblad*, currently has 460,000 'friends' on its Facebook account, 332,000 Twitter followers and 40,000 Instagram members.[1] For smaller outlets, social platforms are relatively even more important. For instance, the regional broadcaster *RTV Rijnmond* has 35,500 subscribers to its [YouTube channel](#).

The rationale behind this focus is obvious. With the over-supply of information in the current digital age, the traditional sellers' market of news has shifted to a buyers' market. Therefore, it is important to be where the audience is. Social media rank highly in that respect. In 2018, 43 % of all Dutch people with access to the internet (about 95 % of the adult population) used social media as a source for news on a [weekly basis](#). For 8 % (in 2016) it was even the [main source](#).

Social media also play an important commercial role for modern news companies. The items posted draw the audience to websites with more information and, more importantly from a business point of view, advertisements. The Facebook account of *Algemeen Dagblad* currently leads to 12 million 'clicks' per month to the *AD.nl*-site.[2] The use of social media has become an essential part of its business-model.

Article 13 of the proposed new Directive forces social platforms, under certain circumstances, to impose automated filtering measures to prevent copyright infringing material from being shared. It drew a lot of criticism from the academe, NGOs and political circles, some on this very blog (see [here](#), [here](#) and [here](#)).

For the professional media, a particularly troublesome issue is that of false positives that might result from the application of automated filtering measures. In particular, professional media face the risk that their legitimate content is falsely identified as copyright infringing and that their news

items are blocked, muted or removed from social networks. This outcome, should it occur, would hamper their business model and ultimately curtail their freedom of expression and the freedom of information. This issue of false positives has been recognized by the Court of Justice of the European Union as potentially undermining this fundamental freedom, for example in *Case-360/10 SABAM v Netlog* (para 50).

The daily practice of a media outlet like RTV Rijnmond can attest to that; once in a while videos are not shown or muted which makes them impossible, or at least unattractive, to watch.[3]

Although it is arguable that the Council's version of article 13 improves upon the Commission's original proposal, as far as the professional media are concerned the main significant problems remain. Namely: a) their use of social platforms as a venue to exercise their press freedom still falls within the scope of the article; and b) the obligation to use automated filtering is still on the table, with the risk of false positives. The suggested swift mechanisms for complaints provide (potentially) some redress, but even an expeditious procedure takes time (and effort) and news is a perishable good.

One solution would be to forgo automated content recognition mechanisms altogether, as some NGOs suggest. Another would be to adopt the approach that flagged content can remain available on the social platform as long as a dispute over the alleged copyright infringement has not been resolved, as the Presidency suggested in one of its [previous proposals](#).

Another approach to deal with the issue of curtailing copyright infringement on social platforms, which is after all the main aim of article 13, while at the same time sparing bona fide professional media might be to introduce a mechanism which punishes rightholders, under certain conditions, for making false claims of copyright infringement, as suggested by [Urban, Karaganis and Schofield](#). This would discourage rightholders from making these claims and might encourage social platforms to develop content recognition mechanisms that produce fewer false positives. It would also level the playing field between rightholders, platforms and media.

In my view, however, two other, maybe politically more feasible, alternative approaches are conceivable: a) a general exception for professional media as user for the purpose of article 13; or b) a general exception for the social platforms as far as uploads by these professional media are concerned. The first option would exempt individual uploads by professional media to social platforms like YouTube from the scrutiny of automated filtering. The second option would extend this favorable treatment to dedicated YouTube channels or social media accounts of established media companies.

About the author: Jan van Vegchel is a former journalist and an LLM student at the University of Amsterdam (IViR). This blogpost is based on his paper: [European Council's amended proposal for a Directive on copyright in the Digital Single Market; is it enough to ward off the threat to press freedom?](https://ssrn.com/abstract=3234175) (<https://ssrn.com/abstract=3234175>)

[1] Email from Jaap van Zessen, manager digital ADR Nieuwsmedia, to author (3 May 2018).

[2] Email from Jaap van Zessen, manager digital ADR Nieuwsmedia, to author (3 May 2018).

[3] Email from Herman Vriend, senior editor online RTV Rijnmond, to author (14 May 2018).

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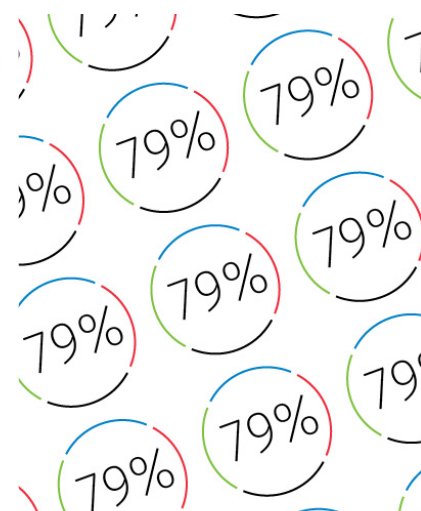
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