Kluwer Copyright Blog

Poland's Challenge to the DSM Directive – and the Battle Rages On...

Tomasz Targosz (Institute of Intellectual Property Law, Jagiellonian University Kraków) · Monday, June 10th, 2019

The Polish government has filed a complaint against the new DSM Directive, and more specifically against its art. 17. While it will be a long time until the CJ EU issues a decision, the complaint makes it likely that the battle for the rules on intermediary liability is not over; it has just been moved to a different battlefield.

Does the complaint have any chance of success? Because of the controversies surrounding the directive it is understandable that this action has attracted attention in many EU member states, and those interested want to know more. Unfortunately, not much more can be known at present.

Answering these questions would be easier if we had access to the complaint itself and the arguments it relies on. Unfortunately, the Ministry of Foreign Affairs has published a statement in which it claims that the complaint cannot be made public as this would be contrary to EU law (referring to the decision in joined cases C-514/07 P, C-528/07 P and C-532/07 P). Others argue this is not so (see T-264/15 – Gameart v Commission), but even if there is no law precluding a member state from giving the public access to the complaint itself, there is also no law that would mandate it. The public thus can, but does not have to, be kept in the dark.

Out of the bits and pieces of available information and some knowledge of the social and political context relevant to Poland's attitude towards the DSM Directive, the following conclusions can tentatively be drawn:

There is a strong political flavour to the complaint. This can be deduced from the recurring characterisation of the DSM Directive as "ACTA 2". I do not mean here by the media or common internet users, but the Government itself. The information posted on the official website of the Ministry of Culture (in Poland, responsible for copyright-related matters) on the day the complaint was filed (24 May) read: "Poland has filed a complaint to the CJ EU regarding the ACTA 2". The analogy to ACTA is objectively dubious – while ACTA mostly confirmed the existing IP regime and was supposed to create a golden standard of protection to be emulated by non-member countries, the Directive breaks new ground and tries to confront new challenges (regardless of what one may think about the details and the legislative quality of the document). The resurrection of the long-deceased ACTA is however understandable when one recalls how politically charged the ACTA affair proved to be in Poland and how universal the opposition against it appeared at the time (more about it here). To revive the spirit of ACTA and present oneself as its staunch opponent

could be politically beneficial. To support the DSM Directive, on the other hand, could only backfire.

It is probably for these reasons that the leader of the governing Law and Justice Party (PiS), Mr Kaczynski, declared Poland would challenge “ACTA 2” in the midst of the campaign before the elections to the European Parliament. It is no secret Mr Kaczynski is much more powerful than the Prime Minister or other government members (consequently, his reputation more precious) and so, one may suspect, his electoral promise had to be acted upon.

The complaint targets art. 17 of the Directive and what the Minister of Culture has referred to as the “preventive censorship” it could bring about. The argument would go that art. 17 will in fact make all affected ISPs use automatic filtering software, which must clash with the freedom of expression. The Minister has mentioned the EU Charter of Fundamental Rights and Polish constitution, though the latter will not be legally relevant for the CJ EU. As usual, all this will probably come down to the principle of proportionality. The Ministry’s communiqué stresses that Poland is not opposed to the copyright reform as such, only to its excesses.

A cynic could say that the refusal to make the text of the complaint publicly available would suggest it is not brimming with dazzling legal thoughts and ideas; the truth is though that we do not know and, perhaps more importantly, it does not really count. No matter how the complaint is argued in terms of the legal quality of reasoning, it may be effective as long as there are no obvious formal errors. The issue at stake will garner so much attention that the arguments the Court will have to consider will go way beyond the initial complaint. We can expect numerous and voluminous publications, position papers, etc., spelling out all the legally relevant factors (especially as so much has been already said). The complaint can therefore be compared to lighting the fuse. Whether any explosion will result from it is not certain, but sometimes even a tiny spark suffices.

This entry was posted on Monday, June 10th, 2019 at 3:24 pm and is filed under inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.">CJEU, European Union, Legislative process, Poland
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.