Kluwer Copyright Blog

# The Dutch DSM copyright transposition bill: safety first (up to a point) – Part 2

Remy Chavannes (Brinkhof) · Thursday, June 11th, 2020

The first part of this post provided an introduction to the DSM copyright directive transposition bill submitted to the Dutch parliament on 15 May (operative provisions Dutch / auto-translate, explanatory memorandum Dutch / auto-translate), and a discussion of the provisions transposing Article 15 (the press publishers' right). This Part 2 continues with an analysis of the first half of Article 17 (OCSSPs). Part 3 will finish up with the second half of Article 17 and some concluding remarks.

**Liability of online content-sharing service providers**

**Scope**

As regards the scope of application of Article 17, i.e. the definition of "online content-sharing service" in Article 2(6), the Dutch transposition draft provides no help over and above the relevant provisions and recitals of the directive itself. The definition in Article 29c(8) is essentially copy-pasted from Article 2(6), while the explanatory memorandum refers to recital 62, including the statement that the definition is directed at online services which play an important role on the market for online content by competing with other online services, such as online audio and video services, for the same audience. It names one service as being in scope (YouTube), but does not provide examples of services that are out of scope. Again, this is presumably motivated by the desire to reduce the risk of incorrect transposition: stating anything beyond that YouTube is in scope is apparently felt to be too dangerous.

On the one hand, this lack of interpretative guidance is disappointing: the poorly delineated OCSSP definition is a significant weakness of the directive, which exposes a potentially wide range of online service providers to the risk that Article 17 *may* apply to them. On the other hand, any guidance or specific examples that the Dutch government could have chosen to provide would probably have been of questionable value in increasing legal certainty, if not downright counterproductive: it is a safe bet that the definition will at some point be submitted to the CJEU in preliminary reference proceedings, and that the CJEU will then rule that the definition is an autonomous concept of EU law which must be interpreted uniformly across the EU. Providing stakeholders with a sense of legal certainty which later turns out to be wrong is arguably worse than providing no guidance at all (and certainly riskier from the government's perspective).

When it comes to Article 17(1), the Dutch bill avoids the excess of the pending French transposition proposal, which includes the reproduction right along with the communication to the public right.[1] The explanatory memorandum also clarifies something which the French proposal does not address, namely that the reference in the second sentence of Article 17(2) to "the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC" means that Article 17 does not apply to software. By the same logic, Article 17 does not apply to the press publishers' right, and the reference to this right has been deleted from the transposition of Article 17(1) in the Neighbouring Rights Act.

**"Best efforts" and the Article 17(4) safe harbour**

One notable change between the consultation draft of July 2019 and the proposal submitted to parliament in May 2020 relates to the "best efforts" required of OCSSPs to qualify for the Article 17(4) safe harbour. In keeping with the official Dutch translation of the directive, the consultation draft referred to OCSSPs having "made every effort" ("alles in het werk hebben gesteld") to obtain authorisation and ensure the unavailability of notified works. As Eleonora Rosati set out in an IPKat post in May 2019, the different language versions of the directive contain significant differences in this regard. Some use words suggesting a subjective obligation of significant effort, while others use words suggesting a stronger duty of care, an objective obligation to make every effort imaginable to achieve a specific result. The Dutch proposal now refers to the OCSSP having "exerted itself to the best of its ability" ("naar beste vermogen heeft ingespannen"), which the explanatory memorandum suggests better reflects the legislative intent – it refers explicitly to the English phrase "best efforts" and the fact that the negotiations on the directive were conducted in English.

The Dutch proposal provides some limited guidance on what "best efforts" means in practice. In relation to licensing, the explanatory memorandum says that it will not always be possible to obtain prior authorisation from individual rightholders (this may differ between different sectors and repertoires), but that this may be different where rights are exercised by collective management organisations (and in particular where extended collective licensing is in place). In other words, while the proposal stresses that collective management is not mandatory, and emphasises the contractual freedom of both rightholders and OCSSPs, it does suggest a link between (extended) collective licensing and the extent of "best efforts to obtain an authorisation". The reference to extended collective licensing in the content of Article 17 is creative, but it remains to be seen whether it would solve more problems than it creates. The explanatory memorandum is not entirely consistent, however, referring a number of times to the OCSSP simply requiring "prior authorisation". The directive does not appear to provide that prior authorisation is required or feasible in all situations. Such a requirement would be impossible for most user-generated content

platforms, or at least would incentivise severe restrictions on users' ability to upload certain types of content.

In relation to best efforts to ensure unavailability of notified works, the transposition sticks closely to Article 17(4) and recital 66. The operative provision is essentially copy-pasted, and while the consultation draft of the explanatory memorandum described it explicitly as a "filtering obligation", the final version refers to filtering 22 times without ever quite saying that Article 17(4)(b) requires it. The prohibition on general monitoring is deemed to be respected by the fact that any duty to prevent availability is only triggered by the provision of specific information from rightholders:

*OCSSPs should use their best efforts in accordance with the high sectoral standards of professional diligence to prevent unauthorised disclosure of protected works and other subject-matter, for example by filtering, but only after rightholders have provided the relevant and necessary information. No general monitoring obligation is therefore introduced and the application of the provision should not lead to this.*

Article 29c(7) contains a basis for further measures to be taken by order in council concerning the application of the provision. This allows for measures reflecting the outcome of the European Commission's stakeholder dialogue process, but also for other – as yet unspecified – further measures. In this context, the explanatory memorandum refers to the need to strike the right balance between all the interests and fundamental rights involved. As such, the order in council could include measures aimed at ensuring that exceptions and limitations are not undermined and ensuring adequate transparency obligations in relation to measures taken by OCSSPs.

**Proportionality**

While last year's consultation draft discussed the proportionality principle of Article 17(5) only in the explanatory memorandum, the final proposal includes it as an operative provision. Article 29c(3) translates as follows:

3. *In determining whether the provider of an online content-sharing service has complied with its obligations under paragraph 2* [transposing Article 17(4), RDC]*, the following elements shall be taken into account, taking into account the principle of proportionality:*

   *1° the type, audience and extent of services and type of works offered by users of the online content sharing service; and*

   *2° the availability of appropriate and effective means to comply with the provisions of the second paragraph, part 2°* [transposing Article 17(4)(b), RDC, emphasis added] *and the costs thereof for the provider of the online content-sharing service.*

There is an oddity with this transposition of the proportionality requirement, specifically the underlined reference in Article 29c(3)(2) to Article 29c(2)(2). Whereas Article 17(5)(b) refers simply to "the availability of suitable and effective means and their cost for service providers", Article 29c as proposed seems to limit the relevance of the availability of "suitable and effective means" to the "prevention of availability" requirement of Article 17(4)(b). That suggests that the availability and cost of suitable and effective means is not relevant to the other two requirements of Article 17(4), including efforts to obtain authorisation.

Such a limited interpretation is at odds with Article 17(5), and is also inconsistent with the reference to *all* of Article 29c(2) in the first sentence of Article 29c(3) ("In determining whether the provider of an online content-sharing service has complied with its obligations under paragraph 2"). It is not even clear whether the limitation is intentional: the explanatory memorandum explicitly refers to the proportionality requirement in relation to the obligation to obtain authorisation, and states that the requirement has been transposed literally in Article 29c(3). Moreover, the limitation is not part of the SME exception as transposed in Article 29d(3) – which means that the availability and cost of suitable and effective means for obtaining authorisation *would* be part of the proportionality analysis for SMEs, but *not* for other OCSSPs. Such a difference would clearly contravene Article 17(6), which does not create distinct safe harbour requirements but references those in Article 17(4).

Thankfully, there is an easy way out of this mess: simply deleting "part 2°" from Article 29c(3)(2).

The analysis of the provisions transposing Article 17 continues in Part 3.

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[1] *The legislative proposal submitted by the French government to the National Assembly on 5 December 2019 transposes Article 17(1) of the directive in a new Article L.137-2 I, which states that the requirement for an OCSSP to obtain permission for acts of communication to the public is "without prejudice to the permissions which it must obtain for the right of reproduction for the reproductions of said works which it carries out".*

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