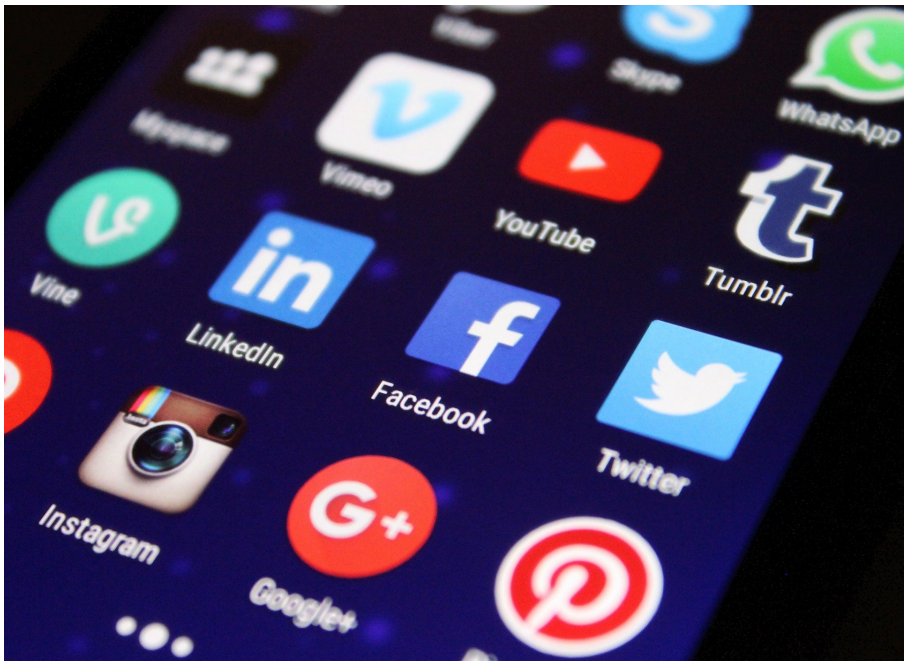
Kluwer Copyright Blog

In copyright reform, Germany wants to avoid over-blocking, not rule out upload filters – Part 2

Felix Reda (GFF (Society for Civil Rights)) · Friday, July 10th, 2020



The first part of this post provided an introduction to the German implementation proposal for Article 17 DSM Directive (the Copyright Service Provider Act), and a discussion of the proposed rules on user rights and pre-flagging. This Part 2 continues with an analysis of the newly proposed exceptions and limitations, the German efforts to achieve greater legal certainty for platform operators, and some concluding remarks.

A compensated exception to reconcile rightsholder and user interests

Unsurprisingly, the German proposal implements the newly made mandatory exceptions for caricature, parody and pastiche (§ 5 – the German "free use" exception, which had traditionally served a similar purpose in German copyright law – was recently declared incompatible with EU law by the CJEU in its Pelham ruling). However, the proposal fails to incorporate new exceptions for criticism and review in its copyright law, which are required by Article 17 alongside the concept of quotation.

The most innovative element of the German proposal is the introduction of a new compensated copyright exception not explicitly included in the EU copyright acquis. The ministry proposes a new exception for "mechanically verifiable uses authorized by law" (§ 6) that cover the non-commercial use of third-party material below a quantitative threshold – 20 seconds of video or audio material, 1000 characters of text, or individual images up to a file size of 250 kiloBytes. A central promise of Article 17's supporters during the legislative process at EU level was that

memes would not be banned from platforms. This proposed exception is clearly an attempt by the German government to protect this central part of online culture, which has become emblematic for the cultural and generational gap between supporters and opponents of Article 17, while reconciling the interests of users with the interest of creators in being remunerated for these uses. While it is questionable whether non-commercial de minimis uses cause any harm to rightsholders, the inclusion of a compensation requirement for the new exception, to be paid by platforms (§ 7), is likely to increase the acceptance of this legislative innovation among a broad range of stakeholders.

While the proposal does not explicitly require platforms to automatically ensure that uses falling below the de minimis threshold remain online, it is clear from the accompanying explanatory note that this is the ministry's intention. Such a quantitative threshold protecting everyday cultural activities by non-professional users would significantly ease the burden of asserting usage rights by means of the pre-flagging mechanism, which requires a solid knowledge of copyright law. At the same time, it is unclear how the ministry imagines that platforms should go about automatically assessing whether a use qualifies as non-commercial. The non-commercial criterion seems out of place in § 6 because the exception, in order to be effective, would also have to cover the act of communication to the public of the platforms covered by the new law, which are for-profit enterprises by definition. An exception privileging the communication to the public of these uses by the platform would in any case only extend to the user in cases where the user is not acting commercially or not generating a significant income (§ 9).

Despite these open questions, the introduction of a new exception to legalize an important part of everyday online culture is a welcome reflection of the Justice Ministry's deep engagement with the academic discourse on Article 17, where the compatibility of such an exception with EU law was first established. After a legislative process at EU level dominated by industry agendas over academic evidence, this proposal marks a welcome change of priorities.

More predictable platform obligations

The German proposal introduces sizeable obligations for platforms, requiring them not only to provide users with the pre-flagging mechanism, but also to handle complaints about the wrongful blocking of legal content – or the wrongful making available of infringing content – within a tight deadline of one week. The requirement to pay compensation to collecting societies for the new exception also falls to platform operators, as well as a direct remuneration obligation towards authors (§ 7), a measure to ensure that licence payments reach the original creators of works, rather than disappearing in the pockets of secondary rightsholders such as publishers and record labels.

At the same time, the proposal makes meaningful attempts to increase legal certainty for platforms, by clarifying not only the definition of hosting providers covered by the new obligations, but also the best efforts required from those platforms in light of the principle of proportionality. In order to decrease transaction costs for platforms and try to reduce the need for upload filters, the proposal heavily encourages the conclusion of extended collective licensing agreements between platforms and collecting societies. By approaching collecting societies for such (extended) collective licences covering types of content typically made available on that platform, platforms can fulfil their obligation to make best efforts to obtain authorization for user uploads, without having to actively approach individual rightsholders that have opted out of the scheme. Platforms do, however, have to accept licence offers from individual rightsholders, provided that they cover a meaningful repertoire and enable the use under "appropriate conditions", including a fair price. This pragmatic

approach addresses the concern voiced in the German parliament that an obligation to obtain authorization for all protected works that users may upload would otherwise constitute a general monitoring obligation.

While Article 17 was clearly inspired by conflicts between YouTube and the music industry, critics of the provision have long warned that the definition of affected platforms, so-called Online Content Sharing Service Providers (OCSSPs), could cover a much broader range of platforms than initially intended, because the possibility for users to share large amounts of protected content is an essential feature of all kinds of online businesses, even if actual copyright infringement is rare on those services. The German proposal includes a welcome clarification from the recitals of the DSM Directive that the concept of OCSSPs should only cover user-generated content platforms that compete with (directly licensed) online content services for the same audiences. This clarification is likely to reassure arts and crafts or cooking recipe platforms, online dating services like tinder, and link aggregators like reddit that they will not fall within the scope. While those platforms do host large amounts of protected content, it's also clear that they do not compete with the likes of Spotify or Netflix. Finally, the German proposal also makes use of clarifications in the recitals that the use of upload filters by very small platforms (less than 1 million € yearly revenue) would be disproportionate and that platforms designed to facilitate copyright infringement cannot limit their liability under Article 17.

The road ahead

While the German implementation proposal includes a lot of innovative and thoughtful elements, the devil is in the details. Some elements of Article 17 appear to be missing altogether from the draft, such as the obligation to explicitly protect copyright exceptions from being overridden by platforms' terms and conditions, the requirement for rightsholders to justify all of their blocking requests (not just in response to user complaints), and the information rights of users' organizations towards platforms. Despite the explicit establishment of an information right for users' organizations in Article 17, the German draft only accords such information rights to rightsholders. The issue of conflicts of law in situations where users, rightsholders and platforms may be established in different countries also deserves further reflection, though the law's explanatory memorandum asserts that the draft Copyright Service Provider Act should be fully applicable to platforms regardless of their place of establishment. The German Justice Ministry welcomes statements from interested stakeholders and academics on its discussion draft by 31 July 2020.

Although it makes considerable efforts to limit over-blocking, the biggest shortcoming of the proposal is that, despite the German government's promises to the contrary, it still relies heavily on upload filters as a central mechanism governing the relationship between rightsholders, platforms and users. Whether such mandatory upload filters can ever be compliant with the ban on general monitoring obligations, which the CJEU has grounded in the Charter of Fundamental Rights in its Scarlet and Netlog rulings, is as doubtful as ever.

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