Kluwer Copyright Blog

Art. 17 DSMCD: a class of its own? How to implement Art. 17 into the existing national copyright acts, including a comment on the recent German Discussion Draft – Part 1

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Part 2 of this publication will be published on the Kluwer Copyright Blog shortly.

***"… [T]his Directive shall leave intact and shall in no way affect existing rules laid down in the directives currently in force in this area, in particular Directives … 2001/29/EC."*.**

Art. 1(2) of the EU Directive on copyright and related rights in the Digital Single Market ("DSMCD") seems very clear on its relationship to the EU Directive on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"). But is the approach it sets out realistic? This two-part blog post examines the interrelation between Art. 17 DSMCD and Art. 3 InfoSoc Directive and makes a proposal on how Member States should implement the multi-level provision that is Art. 17 DSMCD into national law. A longer version of this post can be found on SSRN.

Art. 17 DSMCD has sparked a lively debate, which goes beyond copyright law experts. Its implementation into national law – ignoring for a moment the polarised political discussion – is also technically complex from a legal point of view, and the national legislatures across the EU have an unenviable task.

Any examination of Art. 17 must consider that Art. 3 InfoSoc Directive already contains a provision that serves as a legal basis for the liability of online service providers regarding communication to the public. Articles 3 InfoSoc Directive and 17 DSMCD are thus interrelated.


Photo by Christian Lue on Unsplash

Service providers, such as *YouTube*, can be held responsible under Art. 3 InfoSoc Directive for copyright infringements for which their users are also responsible. In a case arising on the basis of the law as it stood before Art. 17 DSMCD was enacted, the BGH [German Federal Court of Justice] is currently seeking clarification, through a request for a preliminary ruling from the CJEU, as to whether and under what conditions YouTube is liable as a direct infringer under Art. 3 InfoSoc Directive (see CJEU joined cases C-682/18 and C-683/18 – *YouTube/Uploaded*).

The relationship between the two articles is not merely of academic interest: before the oral hearing on 26 November 2019, the CJEU requested that all stakeholders address Art. 17 DSMCD in their oral statements.

This post examines the interrelation between Art. 17 DSMCD and Art. 3 InfoSoc Directive. It also makes proposals on the implementation of Art. 17 DSMCD into national law, which must necessarily be based on an understanding of that relationship. These proposals will be made using the example of German law, including the recent “Discussion Draft” by the German Ministry of Justice and for Consumer Protection of June 24, 2020. The Discussion Draft proposes implementing Art. 17 DSMCD through the introduction of a new law, the so-called “Copyright Service Provider Act”; an English version of this has been made available. The extensive explanatory memorandum of this Discussion Draft may be found here (only in German).

Concept of liability in respect of the right of communication to the public

The key question is whether online services which provide storage space for third party content and publish it on the internet can be responsible as perpetrators (direct infringers). Some national jurisdictions had initially rejected such a liability pursuant to their national laws. For example, the German Federal Supreme Court (BGH) held that – generally speaking – only claims for injunctive relief against such providers would be possible under the principle of *Störerhaftung* [that is, the breach of duty of care], which excludes claims for damages. Such providers would only face damage liability under exceptional circumstances, for example in the case where they are found to act as perpetrators (in particular by making content their own (BGH GRUR 2010, 616 para. 32 – *marions-kochbuch.de*) or as accessory participants (Teilnehmer). The CJEU, however, has developed a liability model that permits, in the scope of Art. 3 InfoSoc Directive, liability as an infringer of copyright (see CJEU, C-160/15, para. 39 – *GS Media/Sanoma*; CJEU, C-527/15, para. 49 – *Brein/Wullems "Filmspeler"*; CJEU, C-610/15, para. 36 – *Brein/Ziggo "The Pirate Bay"*).

The CJEU takes this concept of liability from an interpretation of the fully harmonised right of communication to the public as per Art. 3 InfoSoc Directive. The CJEU case law opens up two levels (dimensions) for the application of Art. 3 InfoSoc Directive: (1) as an exploitation right (as found in national law e.g. Sec. 15 et seq. UrhG [German Copyright Act]), and (2) as an (intermediary) liability provision. The BGH has since followed the precedent set by the CJEU and has requested clarification on the CJEU's liability model in the referred decisions mentioned above concerning *YouTube* and the file hosting service *Uploaded* (BGH GRUR 2018, 1132 – *YouTube*; BGH GRUR 2018, 1239 – *Uploaded*, CJEU joined cases C-682/18 and C-683/18*).*

The new Art. 17 DSMCD has now become a part of this development. It governs the liability of online platforms which enable their users to store copyright-protected content and communicate it to the public. A classic use case is *YouTube*, which clearly illustrates the interrelation between the new Art. 17 and the current CJEU liability model for online services. This raises the question of the interplay between Art. 17 DSMCD and Art. 3 InfoSoc Directive.

Sole application of Art. 3 InfoSoc Directive if no OCSSP

Before responding to the question of the interrelation, however, we will briefly examine the criteria differentiating Art. 17 DSMCD and Art. 3 InfoSoc Directive. Service providers that do not fall under the definition of an online content-sharing service provider (OCSSP), pursuant to Art. 2 No. 6 DSMCD, are not caught by the liability system of Art. 17 DSMCD. However, they may be responsible under the current provisions, in particular under Art. 3 InfoSoc Directive – if the criteria for liability as established by the CJEU (in particular *GS Media/Sanoma* [C-160/15], *Brein/Wullems "Filmspeler*" [C-527/15], and *Brein/Ziggo "The Pirate Bay"* [C-610/15]*)* are met.

One point of debate is whether Art. 17 DSMCD has a limiting effect on the assessment of liability under Art. 3 InfoSoc Directive in these cases. It could be argued that the provisions under Art. 17 DSMCD should be seen as exhaustive (regarding the scope of liability) also for Art. 3 InfoSoc Directive. Thus, stricter obligations than those provided for in Art. 17(4) or (6) DSMCD would be excluded, even if Art. 17 DSMCD does not apply. This seems uncompelling, especially because Art. 1(2) DSMCD expressly stipulates that the provisions of the DSMCD should not affect the InfoSoc Directive ("shall in no way affect").

Some service providers that fall under the OCSSP definition nevertheless receive special treatment.

For example, according to Art. 17(6) DSMCD, start-ups are subject to lower obligations to act; others have even stricter responsibilities, e.g. OCSSPs whose main purpose is to engage in or to facilitate copyright piracy (see the paper by *Husovec/Quintais*, p. 2). Accordingly, the type of the service's business model has to be taken into account. The clarification regarding piracy-based OCSSPs must be expressly implemented into national law (e.g., as advocated by German GRUR, see statement of 5 September 2019). However, both groups of OCSSPs continue to lie within the scope of application of Art. 17 DSMCD and of Art. 3 InfoSoc Directive. Thus, the same applies to them in relation to Art. 3 InfoSoc Directive as applies to every other OCSSP.

Relationship between Art. 3 InfoSoc Directive and Art. 17 DSMCD

Both the opinion of *Husovec/Quintais* and the German Discussion draft are uncompelling, even though the regulatory system in Art. 17 DSMCD is very peculiar and complex. The relationship between Art. 17 DSMCD and Art. 3 and Art. 5 InfoSoc Directive cannot be explained by a *sui generis* right, which follows its own rules independent of the InfoSoc Directive. Art. 1(2) DSMCD explicitly states that Art. 3 InfoSoc Directive remains intact (as does Recital 64). Recital 64 "clarifies" that an OCSSP performs an "act of communication to the public or of making available to the public" under certain circumstances. Nothing in the DSMCD supports the view that such communication or making available to the public under Art. 17 DSMCD would be a "new" exclusive right independent of Art. 3 InfoSoc Directive. If Art. 17 DSMCD were to create a *sui generis* right of communication to the public, it would not "*leave intact*" and "*in no way affect*" the provisions of the InfoSoc Directive as proclaimed in Art. 1(2) DSMCD. Instead, a differentiation must be made between the exploitation rights level, the legal liability level and the exceptions and limitations level of Art. 17 DSMCD.

The reasons and consequences of this differentiation will be illustrated in Part 2 of this contribution.

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