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 2

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Part 1 of this post illustrated the criteria differentiating Article 17 of the EU Directive on copyright and related rights in the Digital Single Market ("DSMCD") from Article 3 InfoSoc Directive and came to the conclusion that the relationship between the two provisions 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). Instead, as this part 2 shows, a differentiation must be made between the exploitation rights level, the (intermediary) liability level and the exceptions and limitations level of Art. 17 DSMCD.

Exploitation rights level: Art. 17 DSMCD and Art. 3 InfoSoc Directive apply alongside one another

At the exploitation rights level, the two articles should not differ. Art. 17 DSMCD relies on the application of Art. 3 InfoSoc Directive and its wording adopts the (exploitation rights) definition of communication to the public (the same opinion is put forward by *Leistner*, page 13). Nothing in the DSMCD supports the view that Art. 17(1) DSMCD introduces a new *sui generis* communication to the public right.

Given that, from an *exploitation rights perspective*, Art. 17(1) DSMCD does not have any distinct meaning compared to Art. 3 InfoSoc Directive, the character of an exclusive right must generally be retained and a national implementation as a right subject to mandatory administration by collecting societies is not an option.

Against this background, the German Discussion Draft's proposal to establish a new separate right of making available and communication to the public is not compelling. The German Discussion Draft also does not explain how such a right would be different from the right already known from Art. 3 InfoSoc Directive.

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The situation at the (*intermediary*) *liability level* is different. Both Art. 17 DSMCD and Art. 3 InfoSoc Directive have such a liability level in addition to the exploitation rights level.

Art. 17 DSMCD, in particular paragraph 4, stipulates that the OCSSP is "responsible" for unauthorised acts of communication to the public, unless the OCSSP demonstrates that it has complied with the obligations under a)-c). What seems compelling is a *differentiated approach* and consequently a *differentiated implementation*.

- Firstly, the allocation of liability to OCSSPs as perpetrators under Art. 17(4) should be implemented into national laws. This could be done where the respective copyright act deals with the issue of intermediary liability.
- Secondly, the obligations that the OCSSP must observe in order to avoid liability (Art. 17 (3) and (4) lit a) – c) DSMCD), could be classified as limitations of liability, like Art. 14 of the E-Commerce Directive. Consequently, Art. 17(3) and (4) lit a) – c) DSMCD could be implemented where Art. 14 E-Commerce Directive has been implemented into the respective national law, but in a separate provision.

The German Discussion Draft also uses this differentiation between attribution of liability in principle and the exception from this principle through the compliance with certain duties in § 1(1) Discussion Draft (liability) and § 1(2) Discussion Draft (duties). The implementation through a single "Copyright Service Provider Act" may disguise the legal nature of these provisions a bit; but the implementation seems technically correct.

Art. 3 InfoSoc Directive also contains an intermediary liability level as established by the CJEU, for example in its *The Pirate Bay* decision (CJEU, C-610/15). The relation with Art. 14 of the E-Commerce Directive has not yet been clarified. Regardless of how the CJEU rules in the *YouTube* and *Uploaded* proceedings, the legal liability rules of Art. 17 DSMCD take precedence over the rules of Art. 3 InfoSoc Directive (and Art. 14 of the E-Commerce Directive, where applicable). This is because Art. 17 establishes a special rule of liability for OCSSPs that fall under the definition of Art. 2 (6).

The German Federal Supreme Court (BGH) has also asked the CJEU, in its request for a preliminary ruling in *YouTube*, whether the legal liability level in Art. 3 InfoSoc Directive is supplemented or replaced by Art. 11 first sentence and Art. 13 of Directive 2004/48 (Enforcement Directive). Should the CJEU reply in the affirmative, an additional or alternative legal liability level in the Enforcement Directive would have to be considered when interpreting Art. 3 InfoSoc Directive.

Excursus on the exceptions and limitations level: Art. 17 DSMCD takes precedence in part over Art. 5 InfoSoc

The differentiated relationship between Art. 17 DSMCD and the InfoSoc Directive also affects the exceptions and limitations. Precedence via a special provision (lex specialis) can only be considered *insofar as* Art. 17 DSMCD contains a rule. For example, unlike Art. 5(3) InfoSoc Directive, the implementation of Art. 17(7) subparagraph 2, regulating the limitations for quotation, criticism, and review as well as use for the purpose of caricature, parody, or pastiche, is mandatory for the Member States.

For the general interpretation of the exceptions and limitations, however, Art. 5(3) and (5) InfoSoc Directive remain relevant, as also follows from Art. 25 DSMCD. The most suitable place for implementation of the exceptions and limitations would be where the respective national law already provides for exceptions and limitations. For example, in German law, this would be in Sec. 44a et seq. UrhG, where a list of the exceptions and limitations already exists.

The German Discussion Draft does not follow this approach. Rather – as set out above – it sees the entire Art. 17 DSMCD as *lex specialis* vis-à-vis the InfoSoc Directive, which is underlined by the construction of a separate German "Copyright Service Provider Act". Consequently, the German Discussion Draft deems it permissible to establish new exceptions and limitations, which go beyond Art. 5 InfoSoc Directive (explanatory memorandum, p. 35). It proposes in § 6 of the Discussion Draft an exception for uses

"for non-commercial purposes …to the following extent: 1. Up to 20 seconds of an individual film or motion picture, 2. up to 20 seconds of an individual audio track, 3. up to 1,000 characters of an individual text and 4. an individual photograph or an individual graphic with a data volume of up to 250 kilo-bytes".

According to § 6(2), this exception shall only apply if there is no contractual right authorising such uses. Also, remuneration must be paid by the OCSSP through collecting societies. This does not seem to be in line with Art. 5 InfoSoc Directive and its principle not to allow Member States to introduce new exceptions and limitations to copyright for the sake of harmonisation. Indeed, the German Discussion Draft itself is a good example why this principle in Art. 5 InfoSoc makes a lot of sense: if every Member State could decide whether (or not!) to introduce such an exception and its scope, harmonisation of exceptions and limitations would remain an uncompleted endeavour. This was not the intent of Art. 17 DSMCD; recall that Art. 1(2) DSMCD explicitly intends to "leave intact" and "in no way affect" the InfoSoc Directive (so does recital 64).

Conclusion

Article 17 DSMCD raises numerous systematic questions. This applies in particular in relation to Art. 3 and Art. 5 InfoSoc Directive.

The CJEU judgment in the *YouTube/Uploaded* cases (C-682/18 and C-683/18) is highly anticipated. Due to the corona crisis, proceedings have been delayed. The Advocate General's Opinion was released on 16 July 2020. Even if the referral proceedings cannot be decided according to Art. 17 DSMCD due to when that provision came into force, it can still be expected that the CJEU will say something about the relationship between Art. 3 InfoSoc Directive and Art. 17 DSMCD. This will be of great relevance for the implementation of this multi-level provision for all legislators in the EU Member States. The German Discussion Draft is a good example of the approach of implementing Art. 17 DSMCD as a full *lex specialis* and "*sui generis*" provision independent of the InfoSoc Directive. We do not think that this approach is correct. Only the provisions of Art. 17 DSMCD which establish liability and provide for exceptions are *lex specialis*, while the concept of communication to the public and the principle of harmonisation of exceptions and limitations as set out in the InfoSoc Directive should remain intact and apply to Art. 17 DSMCD.

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