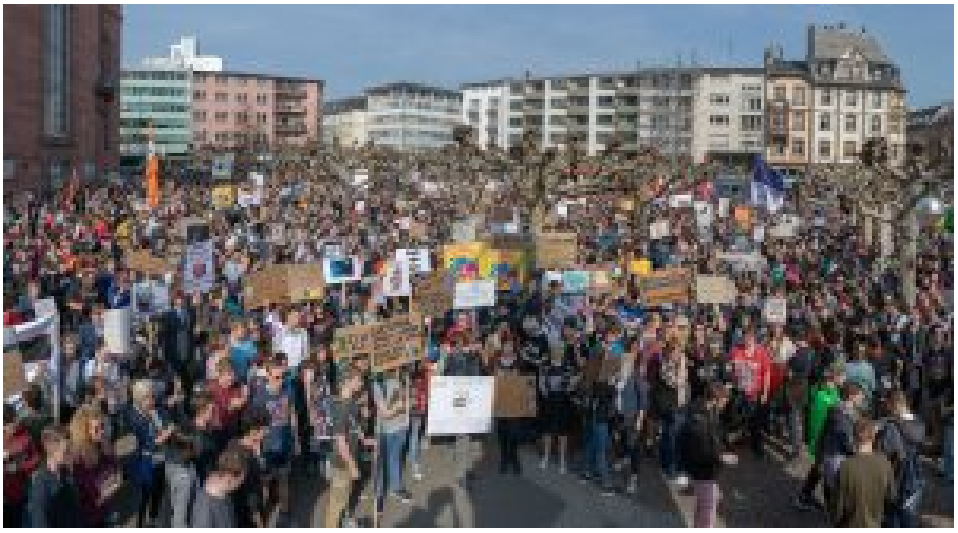
Kluwer Copyright Blog

Article 17: What is it really good for? Rewriting the history of the DSM Directive – Part 1

Felix Reda (GFF (Society for Civil Rights)) · Monday, September 28th, 2020



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EU Member States are currently grappling with the task of implementing the Directive on Copyright in the Digital Single Market (DSM Directive) into national law. The European Commission is preparing its guidance to help national legislators make sense of its most controversial part, Article 17. These legislative developments have prompted a series of remarkably similar statements from rightsholders' interest groups, attorneys and academic commentators about the nature and purpose of Article 17. Part 1 of this blog post puts rightsholders' claims

that Article 17 is a "clarification" of the existing right of communication to the public into historical context. Part 2 will show that this claim has no basis in the legislative text of Article 17.

According to these statements, the provision does not extend the exclusive right of communication to the public, nor the liability of certain online platforms. On the contrary, the argument goes, Online Content Sharing Service Providers (OCSSPs), the subset of for-profit hosting providers covered by Article 17, have been performing acts of communication to the public all along and have hence been liable for copyright infringements of their users. All that Article 17 effectively changes is that it limits the liability of OCSSPs by introducing a new safe harbour, and it strengthens the rights of users by adding mandatory exceptions and safeguards against the blocking of legal content.

As a letter recently sent by rightsholder groups to the European Commission puts it:

"As set out in recital (64), Article 17 clarifies the application of the existing communication to the public right in Article 3 of the Copyright Directive to Online Content Sharing Service Providers (OCSSPs, as defined in Article 2(6) of the Directive) in line with the existing EU and international copyright law."

Clarification of obfuscation?

This reading of Article 17 largely rests on a single word included in the legally non-binding recital 64 and repeated by its proponents with great frequency: the word "clarify". As this blog post will show, however, treating Article 17 as a mere affirmation of the existing exclusive rights and liability regime does not serve to clarify, but rather obfuscate the true nature of Article 17 and its legislative history. Not only does it misrepresent the wording of Article 17 and the relevant case-law, it is contradicted even by statements made during the legislative process by the same rightsholders' organizations that are now promoting this interpretation.

The notion that Article 17 is beneficial to users and platform operators, while limiting the exclusive rights of rightsholders, will appear immediately counter-intuitive to any observers of the legislative debate on the DSM Directive, which was dominated by rightsholders' statements in favour of Article 17 (then Article 13), while online platform operators and especially civil society organizations were fiercely critical of the proposal. A petition launched by internet users against then Article 13 under the slogan #SavetheInternet gathered more than five million signatures. In an attempt to mimic the success of #SavetheInternet, rightsholders' groups started the campaign #Yes2Copyright, which urged Parliament and Council to adopt the final text of the DSM Directive. Following the final vote, the campaign celebrated the adoption of Article 17: "One of the biggest achievements of this new legislation was addressing the 'Transfer of Value' problem", wrote GESAC, the umbrella group of collecting societies and co-signatory of the above letter that

nowadays states that Article 17 has not given rightsholders any new rights that they didn't already have.

If Article 17 was actually intended to improve the legal positions of users and platform operators, while limiting the scope of rightsholders' exclusive rights, shouldn't the reactions to its adoption have been the exact opposite, with rightsholders protesting and users cheering?

Why the sudden change of heart?

This spectacular reversal in the rightsholders' appraisal of Article 17 begs the question: What caused the change of heart? Why is a provision that was originally hailed as a big achievement suddenly presented as a step back for the protection of rightsholders' interests? There are at least three possible explanations.

First, rightsholders don't want to wait for the national implementations of Article 17 to hold platforms liable. Advocate General Saugmandsgaard Øe, in his opinion on the joint *YouTube* and *Cyando* cases currently pending before the CJEU, dismissed the "clarification" argument brought forward by the rightsholder and the French government in no uncertain terms:

"I cannot accept that argument. In my eyes, it would be contrary to the principle of legal certainty to infer such retroactive application from the mere use of an ambiguous term in a recital that is of no binding legal value. […] The envisaged direct liability of 'providers' for acts of communication committed by users of their platforms, provided for in Article 17, is not simply the consequence of the way in which Article 3 of Directive 2001/29 should always have been understood, but 'arises' from Article 17. Therefore, even supposing that the EU legislature can, almost 20 years after the adoption of a directive, provide its authentic interpretation, I consider that that question is not relevant in the present instance. […] As the Commission stated, Article 17 of Directive 2019/790 reflects a political choice by the EU legislature to support the creative industries." (paras 250 ff.)

Incidentally, the French government, which was denying in court that Article 17 was intended to support the creative industries, had been among those sharing the entertainment industry's #Yes2Copyright hashtag on social media, celebrating the Directive's adoption as "a victory for a Europe of culture, which will now be stronger and offer better protection".

A second possible reason for rightsholders' revisionist history of Article 17: Whether the provision is a mere clarification or a sui generis extension of the right of communication to the public has significant consequences for the margin of discretion of Member States when implementing the provision. Germany has recently published its draft implementation, which includes a compensated exception not foreseen in Article 5 of the InfoSoc Directive, but compatible with EU law provided that Article 17 is lex specialis to the InfoSoc Directive or establishes a sui generis right of communication to the public. In response to the consultation on the German proposal, many rightsholders have fought this proposal tooth and nail – probably more motivated by wanting to maintain their exclusive rights than by strong opinions about the acquis.

Similarly, the draft EU Commission guidance states that "Article 17 is a lex specialis to Article 3 of Directive 2001/29/EC and of Article 14 of Directive 2000/31/EC", and that "Member States should explicitly introduce into national law the notion of 'authorisation' for the lex specialis 'act of communication to the public'". This statement prompted the protest letter from rightsholders mentioned above, presumably because rightsholders don't want authorization modes other than individual licenses – such as remunerated exceptions – to be considered by Member States.

The third possibility is that rightsholders find themselves in the position of Goethe's sorcerer's apprentice. While lobbying for a new liability regime for hosting providers may have initially seemed like a good idea, they lost control of the legislation they had advocated for. Other interest groups, most notably internet users, became more vocal during the legislative process than initially expected. After the European Parliament rejected the Legal Affairs Committee's version of the draft DSM Directive in the summer of 2018 over fundamental rights concerns, concessions had to be made and user rights had to be strengthened in order to secure a majority for the Directive in Parliament.

The end result, which for the first time establishes users' rights to the use of copyrighted content and makes several exceptions related to freedom of expression mandatory, may cause some rightsholder groups to question whether they were better off under the old legal regime. This interpretation of the legislative history of Article 17 is somewhat contradicted by the #Yes2Copyright campaign, which welcomed Article 17 in its final version. However, the entertainment industry may not have been as united as the long list of campaign supporters suggests. A minority of rightsholders, from the audiovisual industry, actually saw the writing on the wall in the final days of the negotiations and made a last-ditch appeal to legislators to be excluded from the application of Article 17, to no avail.

What the Directive does

Whatever the motivation behind the "clarification" trope may be, what matters is whether it has merit. The notion that Article 17 merely restates the exclusive right of communication to the public from Article 3 InfoSoc Directive and does not change the liability of OCSSPs rests on the idea that the Court of Justice of the EU (CJEU) has already interpreted the right of communication to the public and the liability limitation for hosting providers enshrined in Article 14 E-Commerce Directive in a manner consistent with Article 17. In other words, Article 17 would merely be a codification of the CJEU case-law on communication to the public and the hosting safe harbour.

If this were true, the definition of OCSSPs in Article 2 (6) DSM Directive would have to faithfully represent the criteria developed by the Court that determine whether a hosting service provider performs an act of communication to the public and/or plays an active role that would disqualify it from the hosting safe harbour in Article 14 E-Commerce Directive. Whether or not the recitals of the DSM Directive say that the Directive clarifies the application of existing law is immaterial – what matters is what the legal provisions actually do. This question will be examined in the second part of this blog post.

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