Kluwer Copyright Blog

Article 17: What is it really good for? Rewriting the history of the DSM Directive – Part 2

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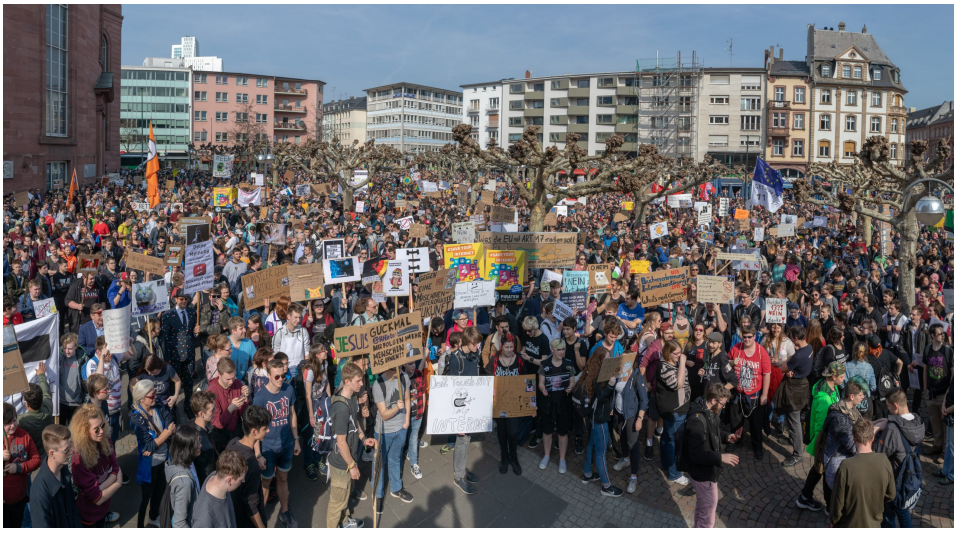

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Part 1 of this blog post introduced the claim by rightsholders and some other commentators that Article 17 of the EU Directive on Copyright in the Digital Single Market (DSM Directive) is a mere clarification of existing Court of Justice case-law on communication to the public and intermediary liability. The second part of this blog post will expose this claim as incorrect by showing that the definition of Online Content Sharing Service Providers (OCSSPs) in the DSM Directive substantially differs from the criteria developed by the Court to establish liability for acts of

communication to the public. While the case-law was the subject of discussion during the legislative process and the final text of Article 17 lifts some familiar wording from the relevant rulings, a number of striking divergences make it clear that Article 17 constitutes a significant departure from the status quo. In this regard, it is useful to distinguish between case-law pertaining to the hosting safe harbour, on the one hand, and the scope of the exclusive right of communication to the public, on the other hand. This is because, under EU law, in order for a provider to be liable for copyright infringement, they must be found to be engaging in a restricted act and must not benefit from the protection of a safe harbour.

Do all OCSSPs play an active role?

In L'Oréal v eBay, a case outside the realm of copyright law involving secondary liability of the hosting service provider eBay for a trademark infringement by one of its users, the Court found that a hosting service provider could not rely on the hosting safe harbour in Article 14 E-Commerce Directive to shield itself from liability for specific uploads of its users, if, with regard to those offers, it "plays an active role of such a kind as to give it knowledge of, or control over, those data" by providing assistance to that user by, "in particular, optimising the presentation of the offers for sale in question or promoting those offers" (CJEU, Case C?324/09, paras 113; 116). As a consequence, eBay could have been playing an active role for certain listings, but not for the

others. It could be active and passive at the same time – to be determined on a case-by-case basis.

The definition of OCSSPs in Article 2 (6) DSM Directive, which determines whether an online platform is affected by Article 17, bears a certain resemblance to the wording in L'Oréal v eBay, by including the criterion of organizing and promoting user-uploaded content for profit-making purposes, which is similar to, but distinct from "optimizing and promoting" in L'Oréal v eBay. However, the definition of OCSSPs also includes certain criteria that are entirely disregarded in the L'Oréal v eBay case, such as the number of user uploads of protected content stored on the hosting provider, the importance of the hosting provider on the content market, and whether the organization and promotion of the user-uploaded content occurs for profit-making purposes. Other criteria that were important in the judgment, most notably whether the optimization and promotion constituted a form of assistance to the seller that would give the hosting provider knowledge of, or control over, the user-uploaded data, are lacking from the legal definition of OCSSPs.

This mismatch between the scope of Article 17 and the L'Oréal v eBay case demonstrates that the DSM Directive does not merely seek to faithfully codify existing case-law on the active role of certain hosting service providers. Most striking, though, is that eBay, the very platform at issue in the court case that supposedly shows that Article 17 is merely a "clarification", is explicitly excluded from the definition of OCSSPs, which does not apply to "online marketplaces". If the purpose of Article 17 was merely to codify existing case law, the legislator would surely not have excluded from its application the very platform that gave rise to the case law in the first place.

Simply defining hosting platforms that fulfil a certain number of criteria as playing an active role and therefore falling outside the scope of the safe harbour would in any case misrepresent the court's conclusions in L'Oréal v eBay. The court made it clear that whether or not a hosting provider played an active role in relation to the data uploaded by a particular user depended on the interactions between the host provider and that particular user. As Advocate General Saugmandsgaard Øe astutely observes in his opinion on the YouTube and Cyando cases, "the 'active role' envisaged by the Court quite rightly relates to the *actual content* of the information provided by users" (para. 152). In other words, an "active role" is not a characteristic of a certain type of hosting service provider, but a characteristic of the relationship built for each listing or piece of content between the hosting service provider and the uploader. As a consequence, the same service provider can play an active role as regards some content and a passive role as regards the rest.

If one read the L'Oréal v eBay ruling as stripping eBay of the safe harbour in general, rather than establishing criteria for determining whether eBay played an active role in the context of a particular case, then the consequence would be that eBay would be liable for all illegal activities by its users, including any copyright infringements whenever a seller illegally used a copyright-protected picture to illustrate a product they were selling. This is clearly not the intention of the court, nor indeed the intention of the European legislator, which excluded all online marketplaces from the application of Article 17.

In the definition of OCSSPs, only a single word – "promote" – appears to be lifted from the L'Oréal v eBay case. It is clear: there is no such thing as an "active platform" and the legislator has not codified this concept when it adopted Article 17.

Have OCSSPs been communicating to the public all along?

The argument that Article 17 clarifies the scope of the right of communication to the public in Article 3 InfoSoc-Directive, rather than extending it, is primarily based on CJEU case C?610/15, also known as *The Pirate Bay*. When the European Commission proposed the draft DSM Directive in 2016, it could not have intended to codify *The Pirate Bay*, on which the Court ruled almost a year later, in June 2017. Of course, the ruling could have been picked up and codified by Parliament and Council during the negotiation process, but the following section shows that this did not happen.

In its ruling, the Court found that the file-sharing website The Pirate Bay had performed an act of communication to the public, because its operators had intervened "in full knowledge of the consequences" (para 26) in the activities of its users and had gone beyond the provision of physical facilities by indexing the torrent files in order to make them more easily findable, and classifying the works under different categories in a way that required them to examine the content of the files, "with the platform's operators checking to ensure that a work has been placed in the appropriate category" (para 38). The Court found that given the high volume of infringing uses, along with the public statements of the operators, which "expressly display, on blogs and forums available on that platform, their purpose to make protected works available to the users, and encourage the latter to make copies of those works", the operators of The Pirate Bay "could not be unaware" (para 45) of the infringements and had intervened in the communication to the public of those works in full knowledge of the consequences.

There are indications that the initial negotiating position of the Council was partially inspired by the wording of the Pirate Bay case. Recital 37a of the Council's negotiating position, which became recital 62 in the final DSM Directive, initially stated:

"[…] Organising and promoting content involves for example indexing the content, presenting it in a certain manner and categorising it, as well as using targeted promotion on it. […]"

Even if this wording was an attempt at codifying existing case-law, it was a poor one. It drew selectively from the court's interpretation of the hosting safe harbour in Article 14 E-Commerce Directive, changing the wording in the process ("organising and promoting" instead of "optimizing and promoting"), and then went on to mix it with selective wording from the case-law on communication to the public (making references to "indexing" and "categorizing"), an entirely separate concept, while leaving out important considerations of the Court in both cases.

Unlike the Court in *The Pirate Bay*, the Council position left out the crucial criterion of engagement with the content of the uploaded files in a manner that would establish full knowledge of the consequences of the operator's actions, as well as a stated intention on the side of the operator to encourage the sharing of infringing works. In any case, the initial Council position was further changed during the trilogue negotiation process, and the reference to indexing was deleted. Instead, other criteria were introduced that have not been developed in the relevant rulings, such as "play[ing] an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences". This is another indication that the legislator's intention was not to merely restate what the court had already found, but to develop a new legal regime.

To summarize, the definition of OCSSPs and the accompanying recitals draw a few individual words from the prior case-law, without paying any attention to the context in which they were used, and combines them with a number of other criteria that are entirely novel. As a consequence,

the right of communication to the public established in Article 17 is a sui generis extension of the right of communication to the public of Article 3 InfoSoc Directive and the new, very limited hosting safe harbour established in Article 17 (4) DSM Directive is designed to absorb some of the effects of that extension. It is not designed to privilege OCSSPs compared to the status quo ante.

Article 17 is uncharted territory

What is clear from the history of Article 17 is that it was conceived of with the intention of changing the legal regime for the liability of platforms to the benefit of rightsholders, whether those rightsholders may be happy with the end result or not. Article 17 is a stark departure from any legal mechanism previously seen in copyright law in the EU, and indeed anywhere else in the world. As a sui generis extension of the right of communication to the public, Member States have considerably more margin of manoeuvre to legislate mechanisms of authorization of that right than some rightsholders may be comfortable with, including compensated exceptions. Rightsholders' efforts to reframe Article 17 as a clarification of existing law and a benefit to platforms and users are unconvincing and will hopefully be exposed as revisionist history by the courts and national legislators.

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