Kluwer Copyright Blog

Germany attempts to square the circle in its implementation of Article 17 CDSMD – Part 1

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On 28 May the German Bundesrat approved the law transposing Directive (EU) 2019/790 on Copyright in the Digital Single Market (CDSMD), thus finalizing the national implementation process. At the core of the German transposition of the CDSMD is the "Act on the Copyright Liability of Online Content Sharing Service Providers" (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG), which implements art. 17 of the directive. This

blog post gives an overview of the most ambitious national implementation of art. 17 to date. With the long-awaited Commission guidance still missing mere days before the transposition deadline on June 7, the German implementation could serve as a model for other Member States. Part 1 of this blog post describes the ex-ante safeguards against the blocking of legal content in the German law. Part 2 examines the ex-post safeguards and other notable elements of the law, such as a novel clause to provide researchers access to data about platforms' content moderation practices.

Article 17 in limbo before CJEU

Arguably the most challenging task for the Member States is to reconcile the requirement of art. 17(4) CDSMD to make best efforts to block infringing user-uploads with the requirement of art. 17(7) that cooperation of rightsholders and platforms must not lead to the prevention of the availability of works that do not infringe copyright. These two obligations appear at odds with each other, as upload filters routinely mistake legal uses (such as those under copyright exceptions) for copyright infringements. The Commission has stressed on various occasions that it views art. 17(7) as an "obligation of result" that would outweigh the "best-efforts obligation" of art. 17(4)(b) and (c). This interpretation has also been followed by the European Parliament and Council in the oral hearing of the CJEU in the case C-401/19, with which the Polish government seeks the annulment of the provisions of art. 17(4)(b) and (c) CDSMD. According to the three EU-institutions, the stronger legal "obligation of result" in art. 17(7) requires ex-ante mechanisms to protect legal uploads from being blocked automatically by automated filtering systems.

Without any guidance from the European Commission or indeed the text of art. 17 itself on how the blocking of legal content should be prevented in practice, the small number of Member States that has implemented the provision at all to date has therefore opted to simply re-state art. 17 almost verbatim, thus failing to provide any ex-ante protection against overblocking. Several authors have therefore questioned the compatibility of art. 17 with the fundamental rights of the Charter, on the grounds that the European legislator has failed its responsibility to design a clear and precise legal framework, including minimal safeguards. Instead, it has shifted the responsibility to design a fundamental rights compliant implementation of art. 17 to the Member States. The UrhDaG is the first transposition that tries to breathe life into the abstract requirements of art. 17 (7) CDMSD.

What goes up? Ex-ante protection for presumably authorized uses

The core ex-ante safeguard against overblocking in the UrhDaG is the concept of uses "presumably authorized by law" (Sec. 9 – 11 UrhDaG). This applies whenever automated means are used to block user uploads. Content that is presumed to be authorized by law cannot be blocked automatically at the upload stage and must be made available on the platform. In addition, platforms are required to pay compensation to collecting societies for presumably authorized uses. If an upload filter recognizes a match with a protected work in an upload that meets the criteria of a presumably authorized use, the rightholder is informed of the upload immediately. In order to disprove the presumption that the use is authorized, rightsholders have to resort to the complaints mechanism, during which the upload remains online until the platform has conducted a human review.

Uploads are considered presumably authorized if they cumulatively meet the following requirements:

1. the upload uses less than half of one or more third-party works,
2. it combines third-party content with other content, and
3. it must be either a minor use (non-commercial use of less than 15 seconds of audio or video, 160 characters of text or 125 kB of an image) *or* have been flagged by the user as authorized by law.

The concept of presumably authorized uses is the central instrument of the UrhDaG to safeguard user rights and protect legal content from being blocked automatically. This concept originated in

the first discussion draft of the Ministry of Justice in July 2020 and has evolved substantially during the legislative process, mostly to the detriment of users' rights. In particular, the thresholds for minor uses have been reduced and the concept has been changed from a copyright exception to a *legal presumption*. A "red-button" mechanism has been introduced that allows "trusted rightholders" to request immediate blocking if they declare after a human review that the use is infringing and the ongoing making available to the public would significantly impair the exploitation of the work. The flagging mechanism no longer covers contractually permitted uses, i.e., works for which the user has obtained a license. The requirement that presumably authorized uses must never use more than 50% of a protected work excludes a number of legal uses, for example quotations of whole works, from ex-ante protection. Finally, the presumption of authorized use does not apply to any excerpts from video material until its initial communication to the public has ended. This mechanism was introduced to offer additional protection to unpublished cinematographic works and live broadcasts.

Despite these shortcomings, the concept of presumably authorized uses still provides a predictable legal framework with a robust minimum of protection from automated blocking for common uses under copyright exceptions in the context of online platforms, such as parody, remix or quotation. However, this concept does not provide protection against other types of overblocking, for example mistakes resulting from false copyright claims or the use of public domain material. Since the suspension of ex-ante protection depends entirely on the information that rightsholders provide, misuse or negligence has an immediate impact on the availability of potentially legal content.

Part 2 of this blog post examines the incentive structure that platforms are faced with when deciding whether to block user uploads, as well as the ex-post safeguards against overblocking envisioned by the German legislator to try to protect those legal uses that do not benefit from the ex-ante safeguards.

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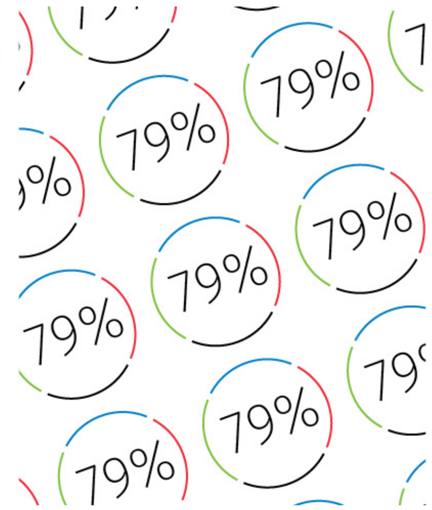

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