Kluwer Copyright Blog

Germany attempts to square the circle in its implementation of Article 17 CDSMD – Part 2

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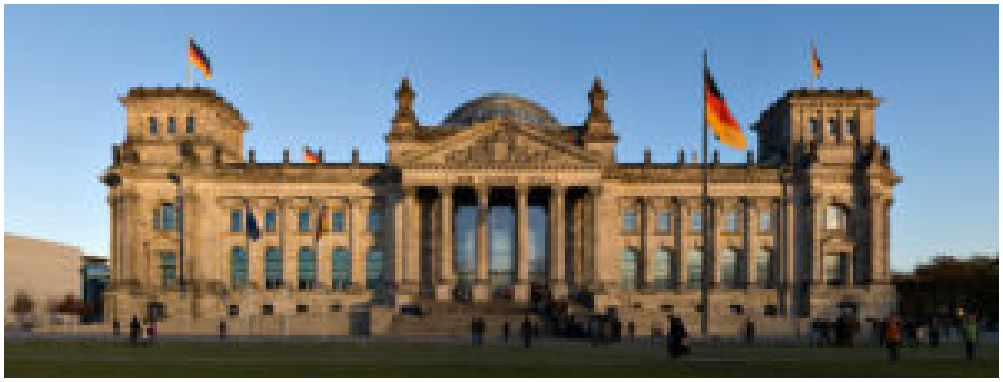

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In Part 1 of this blog post, we introduced the core mechanism of ex-ante protection against the blocking of legal uploads in Germany's implementation of art. 17 of the Directive on Copyright in the Digital Single Market (CDSMD). In Part 2, we examine other elements of the German implementation bill, the "Act on the Copyright Liability of Online Content Sharing Service Providers" (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG), which aim to counter-

balance the incentives that art. 17 CDSMD places on platforms to over-block user uploads when in doubt about their legality. First, we describe the incentive structure of art. 17 itself, which we argue heavily favours rightsholders. We go on to highlight specific provisions of the German UrhDaG, the measures against misuse of upload filters and the transparency provision for researchers, which could serve as a model for other Member States aiming for a more balanced approach to reconciling rightsholders' and users' rights.

Article 17 incentivizes platforms to block legal content

In order to protect legal uses from over-blocking, ex-ante protections need to be complemented by coherent incentives for platforms not to systematically make decisions to the detriment of users' rights. Art. 17 CDSMD introduces direct liability of platforms for copyright infringements resulting of uploads by their users if they fail to make best efforts to block infringements. The suspension of the liability exemption for hosting service providers enshrined in art. 14 of the E-Commerce Directive shifts the responsibility for copyright enforcement from rightsholders to platforms and strongly incentivizes overblocking on the side of the platforms. The directive does

not however foresee any consequences for the violation of the obligation to protect legal uploads in art. 17 (7) CDSMD. The directive thereby disadvantages users, by incentivizing platforms to systematically block uploads in case of doubt rather than to risk liability.

The German legislator fails to provide comparable sanctions against the breach of user rights that could outweigh the risk of liability towards rightsholders. Nevertheless, Germany has taken several steps to address this imbalance through an incentive structure for platforms that reduces liability risks from the protection of legal content. Platforms are not only exempted from liability for presumably legitimate uses until a complaints procedure has taken place; they are obliged to continue making such uses available. Otherwise, platforms could simply suspend user rights through their terms and conditions in an effort to cut costs.

When rightholders challenge the legality of a presumably authorized use, or when users complain about the removal of their upload, platforms are required to make a complex legal and factual assessment. If platforms were fully liable for the decisions made to resolve complaints, numerous false blockings in cases of doubt would be the consequence, limiting the protection of users' rights during the in-platform complaints procedure. According to Sec. 12(1) UrhDaG, platforms are only liable for damages if they culpably breach their obligations in the context of the complaint procedure. While this does not exempt the platforms from liability to cease and desist, it reduces the financial risks for decisions that favour users.

The UrhDaG nevertheless still includes a significant incentive for platforms to block legitimate uses under the exception for caricature, parody and pastiche. Platforms are required to pay compensation for all uses under this exception, even though there is no such requirement for similar uses outside the scope of uses covered by art 17 CDSMD. This obligation to compensate certain legally permitted uses incentivizes platforms to block content in cases of doubt in order to evade payment.

A user-centered collective right to action

The UrhDaG adds a set of ex-post measures that go beyond the requirements of the directive and could bring more balance to the incentive structure. Sec. 18 UrhDaG provides for several measures against the intentional or negligent misuse of the blocking mechanisms by (alleged) rightsholders. It also includes measures against misuse of the flagging mechanism by users, or of the "red button" by trusted rightsholders. These remedies are necessary to ensure the effectiveness of the ex-ante mechanism, which depends to a large extent on the provision of correct information by rightsholders. The measures against misuse are the only protection against the blocking of works for which users have obtained a license, including Creative Commons licenses, or works which are in the public domain. This is because the ex-ante measures for the protection of "presumably authorized uses" introduced in part 1 of this blog post only allow the flagging of uploads that are covered by a copyright exception.

The most innovative measure against misuse in the German implementation can be found in Sec. 18 (6) UrhDaG, which introduces a right for associations representing the interests of users to claim injunctive relief against platforms in cases of repeated false blocking. This provision underlines that even beyond making available "presumably authorized uses", platforms have a responsibility under art. 17 (7) CDSMD – implemented verbatim in Sec 7(2) UrhDaG – to

continuously improve their systems to avoid blocking of legal content.

Collective rights of action for associations that represent the interests of platform users are a novelty to German law, which only provides collective remedies for very few interest groups, namely consumer, animal protection and environmental associations. In an important departure from this tradition, Sec. 18(6) UrhDaG explicitly references user organisations, rather than limiting the collective redress to established consumer protection bodies. While the notions of consumers and users conceptually overlap in many cases, the underlying interests are not always the same. Certain platform users are active in especially fundamental rights sensitive contexts, which are difficult to subsume under the concept of consumers. Think of journalists who publish content on platforms or artists who use platforms for the distribution of their art. In order to effectively protect all legal content from false blocking, it is important that these uses are equally protected by the respective user organisations. The explanatory memorandum of the German implementation extensively references the impact of over-blocking on freedom of expression. Fundamental rights NGOs such as the authors' Gesellschaft für Freiheitsrechte (Society for Civil Rights) should therefore be able to make use of the collective action provision in order to enforce users' fundamental rights in court.

Access to information on content moderation for researchers

Another innovation by the German legislator comes in the form of a research clause not specifically foreseen in art. 17 CDSMD. Sec. 19(3) UrhDaG requires platforms to grant researchers access to data on the use of procedures for automated and non-automated detection and blocking of content for the purpose of scientific research. This research clause can play a crucial role in the protection of legal content balancing user interests against the interests of rightsholders and platforms.

Art. 17 CDSMD does not provide for any information rights for researchers on the functioning of blocking algorithms nor on the content that is actually blocked. According to Art. 17(8), only rightsholders have the right to be provided with "adequate information" regarding the functioning of automated blocking mechanism by the platform. While users' association are entitled to adequate information on platforms' blocking practices in the context of the stakeholder dialogue according to art. 17(10), the European Commission has concluded said stakeholder dialogue without enforcing this transparency provision. Sec. 19 (3) UrhDaG fills this gap by introducing a robust research clause that creates the obligation to make available not only "adequate information" but comprehensive data on blocking mechanisms for research purposes. The impact of this clause goes beyond the benefit for research on algorithmic decision-making. Access to data enables public oversight through the results of the research and incentivizes platforms to comply with their legal obligations.

The research clause could improve the effectiveness of the above-mentioned user associations' right to injunctive relief against structural overblocking. In order for such right to be effective, user associations must obtain knowledge of repeated false blockings by the platforms. Through the introduction of the research clause, user associations do not have to rely on individual users reporting single blockings. By gaining access to the platforms' data, researchers can detect systematic violations with considerably less effort and more precision and make the results of their research publicly available.

The Bundestag's justification of Sec. 19(3) shows that the legislator made a serious effort towards transparency with the research clause. It is explicitly stated that the research clause serves the purpose of creating a sound empirical foundation for a critical assessment of the danger of systematic over-blocking that arises from the use of automated filtering systems. It is worth noting that the legislator not only had increased transparency regarding upload filters in mind, but rather wishes to address the whole picture of algorithmic content moderation. The justification states that the data provided through the research clause should provide *in particular* data from the platform environment about the selection and ordering algorithms some of which the legislator deems "not very transparent".

The Road ahead

Before the German copyright reform can enter into force, the President needs to sign it and it must be published in the official journal, which could happen as early as the end of this week. While the largest part of the transposition law enters into force on time of the deadline on 7 June 2021, platforms are given a longer timespan to prepare for their new obligations under the UrhDaG, which will enter into force on 1 August 2021. It is already clear that the majority of EU Member States is going to miss the transposition deadline, with many national governments still stuck in the early stages of making sense of art. 17. In the absence of the still unpublished European Commission guidance, the German implementation could become a blueprint for other countries to follow. Some of its provisions, most notably the collective redress mechanism for users' organizations and the transparency obligations of platforms towards researchers, could also serve as models for the Digital Services Act, which is under negotiation by the EU legislators and aims at horizontally regulating online content moderation.

Despite the considerable efforts of the German legislator to give meaning to the provision in art. 17(7) CDSMD that legal uses must remain available, the use of upload filters is still likely to lead to the blocking of legal content under circumstances not covered by the concept of presumably authorized uses. The impact of the law on platforms' freedom to conduct a business is also considerable. Despite the additional fundamental rights safeguards in the German implementation, it remains an open question whether the preventive measures obligations of art. 17 can be reconciled with the Charter of Fundamental Rights. The Advocate General's opinion in the Polish challenge against art. 17, will likely shed light on this important question. Until then, the German implementation remains in our view the only practical guidance on how Member States can hope to square the circle of the competing obligations to protect both rightsholders' and users' rights.

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