

Kluwer Copyright Blog

European Commission back-tracks on user rights in Article 17 Guidance

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The European Commission has published its long overdue guidance on the application of art. 17 of the Directive on Copyright in the Digital Single Market (CDSMD), a mere three days before the implementation deadline. The final version of the guidance makes it clear that the Commission has abandoned the position it [held before the CJEU](#) that art. 17 is compatible with fundamental rights as long as only manifestly infringing content can be blocked. This about-turn follows several [closed-door meetings](#) with Member States and rightsholders who had criticized the user rights safeguards included in the [draft guidance document published last year](#). By failing to hold Member States to the standard of fundamental rights protection that the Commission itself described as necessary in the ongoing CJEU case ([C-401/19](#)), it has significantly weakened the case for compatibility of art.17 with the EU Charter of Fundamental Rights.



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In this blog post, we provide a critical assessment of the guidance, a Communication that the European Commission was required to issue according to art. 17(10) following an extensive stakeholder dialogue. While not legally binding, the guidance has nevertheless been eagerly awaited. The majority of Member States has not yet implemented the directive, despite the implementation deadline of 7 June. The draft guidance was already the subject of extensive discussion in the public hearing of the CJEU on art. 17 last fall, which led commentators to hope that the document would reconcile the competing requirements of art.17: on the hand, the requirement on platforms to make best efforts to automatically block copyright infringements on request of rightholders; on the other hand, the requirement on both rightholders and platforms not to block legal uses of the same works, for example under exceptions and limitations. We conclude that the guidance fails to live up to this promise, by leaving the protection of user rights to the discretion of rightholders.

A loophole big enough to drive a truck through

At first glance, the guidance follows the interpretation of art. 17 that the European Commission has defended before the CJEU: The obligation on rightholders and platforms to leave legal uses unaffected included in art. 17(7) constitutes an obligation of result and therefore trumps the obligation on platforms to make best efforts to block infringing uses of works on request of rightholders according to art.17(4). Consequently, to protect users' fundamental right to freedom of expression, fully automated blocking must be limited to cases of manifestly infringing uploads. All other cases require some form of human assessment, during which the user uploads must remain available. However, by including an exception to this rule in the final guidance that is so broad as to cover virtually all cases that rightholders wish to cover, the rule that user rights are protected becomes the exception in practice.

While the Commission maintains that it is “not enough for the transposition and application of Article 17(7) to restore legitimate content ex post under Article 17(9), once it has been removed or disabled” and argues that that only manifestly infringing content should be blocked automatically, these “principles” are included in name only. According to the final guidance, rightholders can easily circumvent the principle that automatic blocking should be limited to manifestly infringing uses by “earmarking” content the “unauthorised online availability of which could cause significant economic harm to them” when requesting the blocking of those works. Uploads that include protected content thus “earmarked” do not benefit from the ex-ante protections for likely legitimate uses. The guidance does not establish any qualitative or quantitative requirements for rightholders to earmark their content. The mechanism is not limited to specific types of works, categories of rightholders, release windows, or any other objective criteria that could limit the application of this loophole. The relevant passage in Section V.2 simply states that they “may choose” to do so (emphasis ours):

*When providing the relevant and necessary information to the service providers, rightholders **may choose** to identify specific content which is protected by copyright and related rights, the unauthorised online availability of which **could cause significant economic harm to them**. The prior earmarking by rightholders of such content may be a factor to be taken into account when assessing whether online content-sharing service providers have made their best efforts to ensure*

the unavailability of this specific content and whether they have done so in compliance with the safeguards for legitimate uses under Article 17(7), as explained in part VI below.

“Ex-Ante Human Review” is General Monitoring

While the guidance pays lip service to the principle of proportionality, asking rightholders to “properly justify” their decisions to earmark, the requirements that rightholders must meet are so weak – the mere claim that unauthorized use of a work “could cause” significant economic harm is sufficient – that a requirement to justify earmarking will likely not serve as a deterrent against the mass use of this option. In fact it seems realistic to assume that rightholders will consider all content for which they provide relevant and necessary information to be economically important and will thus earmark all or most of the notified content.

This creates a loophole so large that the “principle” that automated blocking should be limited to manifestly infringing uploads can hardly be considered a principle anymore. This shift in position seems particularly important in the context of the pending CJEU case in [C-401/19](#) as the European Commission’s defense of the fundamental rights compliance of art. 17(4) centred on this very “principle”.

The guidance further postulates that earmarking may not trigger a general monitoring obligation, then goes on to propose “rapid ex-ante human review” as a means by which platforms may ensure the prevention of unauthorized uses of earmarked content. Even a conservative interpretation of the ban on general monitoring would conclude that an obligation of [ex-ante human review of uploads before they may be made available constitutes general monitoring](#). In the only instance in which the CJEU has ever considered a filtering mandate compatible with the ban on general monitoring, the Glawischnig-Pieszek case involving defamation law, the Court’s argument rested precisely on the requirement that the injunction would “not require the host provider to carry out an independent assessment” of the legality of individual uploads, but rather allow “recourse to automated search tools and technologies” (Case C-18/18, para. 46) – the opposite of a human review.

The thinly veiled attempt by the European Commission to present ex-ante human review as an option for platforms is directly contradicted by a subsequent passage which makes it clear that service providers are “deemed not to have complied, until proven otherwise, with their best effort obligations” and can “be held liable for copyright infringement” if they disregard “information on earmarked content”.

*Online content-sharing service providers should be deemed to have complied, until proven otherwise, with their best efforts obligations under Article 17(4)(b) and (c) in light of Article 17 (7) if they have acted diligently as regards content which is not manifestly infringing following the approach outlined in this guidance, taking into account the relevant information from rightholders. **By contrast, they should be deemed not to have complied, until proven otherwise, with their best effort obligations in light of Article 17 (7) and be held liable for copyright infringement if they have made available uploaded content disregarding the information provided by rightholders, including – as regards content that is not manifestly infringing content – the information on earmarked content as mentioned in section V.2 above.***

In effect this means that service providers face the risk of losing the liability protections afforded to them by art. 17(4) unless they apply ex-ante human review to all uploads earmarked by rightholders as merely having the potential to “cause significant economic harm”. This imposes a heavy burden on platform operators. Under these conditions rational service providers will have to revert to automatically blocking all uploads containing earmarked content at upload. **The scenario described in the guidance is therefore identical to an implementation without safeguards: Platforms have no other choice but to block every upload that contains parts of a work that rightholders have told them is highly valuable.**

Intransparent Process Leads to Unbalanced Results

“Earmarking” is a new addition to the Commission’s guidance which was introduced behind closed doors, after the end of the formal stakeholder dialogue, in the final months of discussions. The addition appears intended to address specific challenges posed by so-called “high value content”. It’s clear that the Commission had broadcasts of premium sports events or previously unreleased Hollywood blockbusters in mind when designing this rule, yet the guidance explicitly does not limit the application of “earmarking” to such content:

This may include, when proportionate and where possible, practicable, a rapid ex ante human review by online content-sharing service providers of the uploads containing such earmarked content identified by an automated content recognition tool. This would apply for content, which is particularly time sensitive (e.g. pre-released music or films or highlights of recent broadcasts of sports events)[footnote: Other types of content may also be time-sensitive].

Similar debates have taken place in Germany, where the legislator has made [last-minute changes to its Article 17 implementation](#) in an effort to accommodate demands from the film and sports industries. Perhaps thanks to the more open conduct of the negotiations which gave civil society the opportunity to voice its opposition to suspending user rights safeguards, Germany managed to find a more proportionate solution to the legitimate concern that in some specific circumstances, the economic damage of leaving user uploads online until human review may be high, while the likelihood of lawful use may be low.

According to § 7 (2) of the German “[Act on the Copyright Liability of Online Content Sharing Service Providers](#)”, the safeguards against automated blocking of content that is not manifestly infringing are suspended for protected videos that are unpublished (e.g. pre-release cinematographic works) or while their first communication to the public is ongoing (e.g. live sports matches). The reasoning is that users who upload excerpts from those works before their initial communication to the public has finished are unlikely to have had the time to create a legal parody or quotation. By contrast, the potential economic damage of unauthorized uses of pre-release content is objectively higher than for content which has already been in circulation. Crucially, as soon as the initial broadcast of the video is finished, the user rights safeguards go back into force and only manifestly infringing uses of those videos may be blocked. **Rather than simply giving**

rightholders a carte blanche to suspend user rights whenever they seem inconvenient, Germany has based its protection of “high value content” on an objective risk assessment.

By contrast, the likelihood of legitimate uses never plays into the Commission’s discussion of “earmarking”. There is no reasonable justification why legitimate uses should be less likely, or less worthy of fundamental rights protection, just because the work that is being used is deemed to be of high economic value. Given that more moderate approaches to the problem of “high value content” exist at Member State level, it is baffling that the Commission wants to give rightholders unlimited power to suspend user rights at will. If the issue had been debated openly with input from all stakeholder groups as intended by the European legislator when it conceived of the stakeholder dialogue, the result would likely have looked very different.

The Only Meaningful Guidance Will Come From the Court

By adding the mechanism allowing rightholders to earmark their content at the last minute, the Commission has not only undermined the principle that the initial guidance was based on, it has also invalidated its own position in the pending CJEU case [C-401/19](#) on the fundamental rights compliance of art. 17.

This reversal is especially stark since the Commission does not provide any justification or rationale why users’ fundamental rights do not apply in situations where rightholders claim that there is the potential for them to suffer significant economic harm. It’s hard to imagine that the CJEU will consider that the version of the guidance published today provides meaningful protection for users’ rights when it has to determine the compliance of the directive with fundamental rights. The Commission appears to be acutely aware of this as well and so it has wisely included the following disclaimer in the introductory section of the guidance (emphasis ours):

*The judgment of the Court of Justice of the European Union in the case C-401/192 will have implications for the implementation by the Member States of Article 17 and for the guidance. **The guidance may need to be reviewed following that judgment.***

In the end this may turn out to be the most meaningful sentence in the entire guidance.

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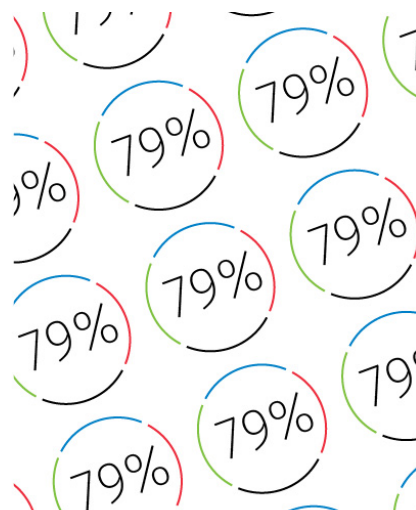
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