Kluwer Copyright Blog

A further step into a systematic distortion: The EC Guidance on Article 17 CDSM Directive further complicates copyright exceptions

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On 4 June 202, the European Commission published its guidance on Article 17 of Directive 790/2019 on Copyright in the Digital Single Market (CDSM Directive). The guidance drew attention mainly because the Commission shifted from a position that rejected ex-ante blocking of content to a permissive take towards ex-ante blocking beyond manifestly illegal content (see here). An integral element of Article 17 in the context of automated filtering as a means of copyright enforcement is the guarantee that lawful uses should not be prevented, and users should not be discouraged or even prohibited from exercising uses covered, for example, by copyright exceptions. The Commission in its guidance refers to this as an 'obligation of result', as opposed to an obligation of

'best effort'. Moreover, Article 17(7) provides that certain exceptions, namely those for quotation, criticism and review and for the purpose of caricature, parody or pastiche, *must* be available to users. This is important because Article 5 of Directive 2001/29/EC (InfoSoc Directive) provides for these exceptions, but does not oblige Member States to implement them. Instead, Member States can 'cherry-pick' from these exceptions, which has been argued to jeopardize the harmonizing objective of the InfoSoc Directive as a whole (see here).

In the 20 years that passed between the adoption of the InfoSoc Directive and the publication of the Commission's guidance on Article 17 CDSM Directive, much has been discussed and many a judgment has been rendered by the Court of Justice of the European union (CJEU) on the status and interpretation of exceptions in EU copyright law. Two points the Commission makes in the guidance are therefore surprising and, from a certain perspective, unwelcome. First, the Commission states that uses that are covered by an exception but relate to content which has been earmarked by rightholders could be blocked. And, second, that the mandatory exceptions in Article 17(7) "apply specifically and only to the online environment", thus seemingly remaining optional for offline uses. We argue below why this is a concerning interpretation of Article 17 considering the fundamental importance of copyright exceptions to maintain a fair balance within copyright law in the EU.

Override of exceptions by 'earmarked' filtering

Although Article 17(7) states expressly that the mechanisms of Article 17(4) shall not result in the prevention of lawful uses, including those covered by exceptions, the guidance suggests that in some cases a preventive ex-ante blocking of lawful content might in fact occur. While the general interpretation of Article 17(4) is that the cooperation of rightholders and online content-sharing service providers (OCSSPs) can only result in the blocking of 'manifestly infringing' uploads, the Commission seems to suggest that content that is not manifestly infringing, but which contains works or parts of works earmarked by rightholders can also be subject to preventive blocking. Such earmarked content, i.e., content for which information has been provided by rightholders before any infringement has taken place, refers to "content whose availability could cause significant harm" to rightholders. This includes, according to the Commission's guidance, "content, which is particularly time sensitive (e.g. pre-released music or films or highlights of recent broadcasts of sports events)."

This is at least partly concerning in that this might prevent content from being uploaded that could fall within the scope of several exceptions largely implemented across the EU. Examples include the exceptions for the reporting of current events, quotation, teaching and scientific research purposes (at least for such uses that fall outside the scope of Article 5 CDSM Directive). The Commission does add that such preventive blocking of uploads should be subject to a "rapid *ex ante* human review", but the fact remains that lawful speech would be subject to preventive, albeit temporal disablement (see here).

It is also remarkable that this "heightened care for earmarked content" requires a special expedited procedure, which does not seem to be available for content which has 'merely' been classified as manifestly infringing, but which might nevertheless benefit from a high level of speech protection – such as public discourse on current and political events. This constitutes a significant departure from the Commission's earlier position as it had been expressed, for example, during the hearing on the Polish government's challenge to Article 17(4) CDSM Directive (see here).

Online and offline exceptions

Another concern has so far been overlooked by the most immediate reactions to the Commission's guidance. The guarantee that certain exceptions must be available to users of OCSSPs is qualified in the text of the Directive by the words "when uploading and making available content generated by users on online content-sharing services". There are three main ways in which this reference to exceptions that are already contained in the exhaustive but optional list of Article 5 InfoSoc Directive could be interpreted.

First, this could mean that these exceptions have now been elevated to a mandatory status, such as the exceptions contained in Articles 4-6 CDSM Directive (see here).

A second interpretation would make these exceptions mandatory only for online uses, or even only for uses taking place on OCSSPs. The Commission seems to prefer the second view when it states that these exceptions "apply specifically and only to the online environment." The Commission takes this position while underlining the importance of these exceptions and this mandatory nature in order to strike a balance between the fundamental rights as laid down in the EU Charter of Fundamental Rights, which the Commission also invokes to justify the preventive filtering of earmarked works. However, it does not become apparent why these exceptions are more fundamental for the exercise of rights such as freedom of expression online than they are for offline uses. This is particularly short-sighted and profoundly clashes with the interpretation by the CJEU which suggests, among others, in its recent trilogy of cases (*Pelham*, *Funke Medien* and *Spiegel Online*) that some exceptions are mandatory because of their utmost importance for the exercise of fundamental rights in the democratic society, and that consistency and effectiveness in the application of exceptions are key to the achievement of the purposes of EU copyright law (see here and here). Adding to this discordance, the Commission's unsystematic and overly restrictive take might lead to further internal disharmonization to the effect that some Member States might, at least in theory, provide for an online exception for parodies while not permitting such an exception for analogue uses.

A third option which could be construed from the Commission's guidance is that the exceptions contained in Article 17(7) are separate from those contained in the InfoSoc Directive. The Commission states cryptically that whilst the exceptions of the InfoSoc Directive are (except for Article 5(1)) optional, those of the CDSM Directive are mandatory, and while the former are

subject to additional conditions, for the latter “there are no further conditions for their application.” Even though across the explanatory documentation and *travaux préparatoires* of the CDSM Directive there is no specific indication of the intention to introduce two new mandatory exceptions for online parody and online quotation via OCSSPs, the current wording of the Commission’s guidance requires further reflection and clarification.

Outlook

The good news is that the guidance is not binding, and Member States are free to (re)design their national laws to safeguard exceptions and accommodate permitted uses on online platforms within the limits set by primary EU law, including the Charter. Reasonable Member States are expected not to introduce a digital parody defence and disable humour and mockery in the offline world, but rather to take the opportunity to modernize and balance their national copyright systems by consolidating the role that the parody and quotation exceptions play in both the analogue and digital environments.

Although this seems to be a desperate attempt by the Commission to square the non-proverbial triangle of rightholders, users and OCSSPs, national courts, whose task will be to interpret on a case-by-case basis the ‘best efforts’ standards, would be well-advised to avoid privileging specific types of content over the exercise of certain exceptions. A prohibition of ex-ante filtering should apply to all uses that are not manifestly infringing and, even more so, when covered by applicable exceptions.

The silver lining of the dark cloud over permitted uses in the online world is the upcoming Opinion of AG Saugmandsgaard Øe on the Polish action for annulment of certain parts of Article 17(4) CDSM Directive, which might bring further clarity to this matter. What should not be forgotten in this context is the indisputable importance of exceptions and limitations for the exercise of fundamental rights, online as well as offline. It is therefore essential to devise a model of implementing Article 17 that is transparent, that provides for legal certainty, and that is workable in the sense that it incentivizes OCSSPs not to block and filter beyond what is necessary.

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