Kluwer Copyright Blog

What’s the buzz? Tell me what’s a-happening (around Article 17)? Tales from Hungary, Germany, Italy and Sweden

Peter Mezei (University of Szeged), Helena K. Jahromi (Institute of International Law, Intellectual Property and Technology Law, TU Dresden), Giulia Priora (NOVA School of Law Lisbon), and Kacper Szkalej (Lund University) · Monday, November 29th, 2021

Article 17 has been a (the) leading buzzword of the copyright reforms of the European Union in recent years (at least half a decade already). The transposition deadline has now passed. As of June 6, 2021, however, only a handful of Member States have implemented Directive 2019/790/EU (Copyright in the Digital Single Market; hereinafter CDSMD). Indeed, countries lagging behind might face infringement proceedings. In light of this, and also the fact that the Commission Guidance on Article 17 has now been published (a few days before the transposition deadline), Member States have shifted to higher speed in their legislative process. The present post intends to introduce the experiences of four selected Member States, namely, Hungary, Germany, Italy and Sweden. The country reports, also presented as a part of a webinar organized by reCreating Europe project team on November 16, 2021, follow each other time-wise, in the order of the acceptance/status of the CDSMD implementation process.

Hungary *(Péter Mezei)*

Following the implementation of Article 5 CDSMD via a government decree in the early months of the COVID-19 pandemic in 2020 (see here, here and here), the preparations for the implementation of the rest of the CDSMD continued throughout 2020. The first (full) draft bill was published on 7 May 2020, and a public consultation took place between May and June 2020. The Hungarian Ministry of Justice and the Hungarian Intellectual Property Office, based on more than

100 responses, published an amended draft bill at the end of July 2020. This version was offered for a targeted (semi-public) consultation in August 2020. Taking into consideration the recommendations at this stage, a third version was submitted for a final semi-public consultation in February 2021. The bill was finally submitted to the Hungarian Parliament on 31 March 2021. The Parliament passed the bill with 136 yeas, 29 nays, and 1 abstain on 28 April 2021. Act XXXVII of 2021 was published on 6 May 2021 and entered into force on 1 June 2021. (The Act is available in the Hungarian language here.)

The Act introduced Articles 57/A to 57/H to the Copyright Act (Act LXXVI of 1999). These rules represent an almost verbatim implementation of Article 17. These Articles include the new authorisation or liability regime for online content-sharing service providers (OCSSPs); introduce safeguards in line with Article 17(7) and (9); and exclude the general monitoring obligation of OCSSPs.

The Hungarian legislation has finally decided to introduce parody, caricature and pastiche exceptions in their fullest scope. Hence, these exceptions not only apply in line with Article 17(7) CDSMD, but also to all offline and any other (non-CDSMD-relevant) online uses in line with the InfoSoc Directive. Quotation, criticism and review were not mentioned in the new Articles of the Hungarian Copyright Act. There was no need to do so. These exceptions have already been generally applicable in the online environment (including the use of content via platforms). Similarly, since hosting platforms have already been subject to detailed rules under the E-commerce Act regarding notice-and-take-down and complaint-and-redress mechanisms, as well as the prohibition of general monitoring obligations, OCSSPs will not necessarily need to amend their procedural settings to comply with the new regime.

Some terminological changes were effectuated during the implementation phase. For instance, OCSSPs are called only CSSPs (”tartalommegosztó szolgáltatók”), as the use of “online” seemed redundant since the rules apply exclusively to online activities. Furthermore, “best efforts” would be defined as “efforts that can be expected under the given circumstances”, which reflects the common standard of the Hungarian Civil Code.

The Act did not take too many extra risks, however. It did not introduce any additional provisions as the German reform proposal did, e.g. pre-flagging of lawful user-generated materials, or quantitative thresholds for the lawfulness of end-user activities.

Germany *(Helena K. Jahromi)*

In Germany, a new law, the UrhDaG, passed by the German parliament on May 20th, 2021, regulates OCSSPs´ copyright liability. It also contains provisions on user rights and on authors' claims to remuneration for uses on platforms.

Art. 17 I CDSMD was adopted almost verbatim into the draft bill, making the uploading of content by users an OCSSP´s own act of communication to the public. While they can now be held liable as perpetrators, OCSSPs previously profited from the e-Commerce Directive´s safe harbor provisions. Under § 10 TMG (the German e-commerce law), host providers' liability was then limited to cases where infringing content was not removed after a notice and take down procedure. Shaped as a duty of care, the liability of platforms was thus limited to the obligation to refrain from

future infringements (cease and desist).

The use of copyright-protected works for the purposes of caricature, parody and pastiche is now expressly permitted in § 51a UrhG (German Copyright Act). The former § 24 (1) UrhG allowed such use essentially under the precondition that the new work maintained a great internal distance from the borrowed individual features of the older work. However, since the provision had been challenged by the ECJ in Pelham v. Hütter [Metall auf Metall III] its continued existence was at least questionable.

Limitations for quotation were regulated even before in § 51 UrhG. Although not explicitly mentioned, the provision as interpreted in the light of Art. 5(3)(d) of the InfoSoc Directive, also covers criticism and review.

After the German government in its statement for the directive´s adoption had set itself the aim of avoiding "upload filters" and bringing them in line with the principle of proportionality, the first draft bills provided for exemptions from filtering for automatically verifiable "snippets" of a maximum length (text/ video/ audio) or size (photographic work), and for content flagged by users as non-infringing. According to the new UrhDaG, content is to be considered as "presumably allowed" if it contains less than half of the copyrighted work, or combines it with other content, and if it is either a case of Marginal Use (§ 10 UrhDaG) or flagged by the user as non-infringing (§ 11 UrhDaG). Only these limited cases lead to a preliminary upload despite a match with information provided by the rights holder. An exception granted to "trusted rights holders", also dubbed "red button mechanism", allows for preliminary blocking under certain conditions.

Italy *(Giulia Priora)*

On November 4th, 2021, the Italian Government formally approved the final version of the legislative decree implementing the CDSMD, putting an end to the process of transposition that started in April 2021. The decree, which substantially reflects the draft advanced by the Government in August (available here together with the explanatory documentation), received favourable opinions from both Chambers of the Italian Parliament, while enflaming the debate within and beyond academic circles.

The parliamentary and public debate mostly revolved around a few selected topics, leaving numerous aspects of the CDSMD-induced modernization of copyright rules virtually untouched. Among them, the enhancement of protection of artists and performers, the new crucial role played by the Italian Authority for Safeguards in Communications (AGCOM), and – most importantly – the decision of the Italian Government to significantly depart from the wording of Article 15 CDSMD (see here and here) have stirred up controversial opinions among experts and stakeholders.

The transposition of Article 17 CDSMD and the introduction of a whole new Title in the Italian Copyright Act dedicated to the "Uses of protected content by online content-sharing service providers" (OCSSPs) has been confronted with relatively less clamour. The newly introduced Articles 102-sexies to 102-decies of the Italian Copyright Act slavishly follow the wording of Article 17, making OCSSPs directly liable for copyright infringements occurring via their services unless they cumulatively prove to have carried out best efforts (as from the Italian translation of the Directive, translated with a quantitative superlative as "*massimi sforzi*") to (i) obtain authorization,

(ii) ensure unavailability of unauthorized content, and (iii) promptly and effectively remove infringing content upon right holder's notice. Worth noting is that the benchmark of the "high industry standards of professional diligence", according to the Italian transposition, applies not only to (ii) but also to (i).

From an end-users' perspective, it is to be welcomed that the Italian transposition of Article 17 includes reference to the quotation and parody exceptions, despite the lack of explicit legislative implementation of the parody exception ex Article 5(3)(k) InfoSoc Directive. However, the Italian legislator also opted for a statutory "ex ante blocking", requiring OCSSPs to ensure the unavailability of content upon which a complaint is pending. No less importantly, regarding the complaint and redress mechanisms that OCSSPs will have to establish to guarantee an effective exercise of copyright exceptions and limitations, the AGCOM is requested not only to issue specific guidelines, but also to decide upon end-users' appeals against the OCSSPs' decisions on content removal, without prejudice to the right of a regular judicial proceeding.

Sweden *(Kacper Szkalej)*

On 8 October 2021 the Swedish Ministry of Justice published its vision for the implementation of Article 17 CDSM Directive (and the Directive as a whole). In doing so it has added an indispensable cog wheel to ensure appropriate implementation of the provision. The publication of the proposal invites stakeholders and the public at large to submit comments until 13 December. In other words, more can be expected to come from Sweden in 2022.

It is difficult to escape the impression that Sweden is late with implementation. But looking through the prism of deadlines, one can easily be led to erroneously assume that officials at the Ministry haven't been busy with implementation. Having been thrown a hot potato in spring 2019, the Ministry was quick to set up an expert group the same year consisting of a full array of different stakeholders and public institutions. This year, rather than warming up the potato in the microwave to meet a deadline, they have prepared a three-course meal that ends with a dessert with a little cherry on top. But in this respectable establishment copyright liability of services, as crucial for the operation of Article 17 as it may be, is an hors d'oeuvre, merely teasing the appetite in preparation for the symphony of tastes that comes afterwards. I will give a reasoned account of the proposal in a separate post, providing below the key takeaways.

The Swedish Ministry of Justice proposes that:

- a new Chapter *6 b* be introduced in the Copyright Act ("the URL") to govern the Article 17 regime;
- liability of service providers be confined to the *making available* prong of the communication to the public right in Article 3 InfoSoc Directive; i.e. to the provision of access on demand, as opposed to live transmissions;
- in the event of unsuccessful attempts to reach agreements, liability for unlawful making available be exempted if the service acts expeditiously to render unlawful content unavailable pursuant to a sufficiently justified notification (*ex post* intervention) and that it does what it can reasonably be required to do (cf. "best efforts") to ensure that unlawful content, about which the service has received relevant and necessary information from rightholders that enables content matching, is not made available on the service (*ex ante* intervention);

- services be obliged to expeditiously provide information to users that content/access has been removed;
- services be obliged to ensure that lawful uses are not blocked (accordingly, as also follows from the proposal, measures taken by services to be exempted from liability are without prejudice to compliance with this obligation);
- users be conferred a mandatory *right* to make available on services content for the purpose of quotation, criticism, and review, as well as parodies, pastiches and caricatures (subject to terms and conditions or laws unrelated to copyright that may affect the content of such expressions);
- users be conferred a mandatory *right* to engage in other non-infringing uses (subject to similar reservations as above);
- services be obliged to inform users about these rights in the terms and conditions;
- services have a complaint mechanism for the benefit of users; such mechanism having a reversed burden of proof imposed on the rightholder following a complaint;
- services which set aside their obligations to not block access to lawful content or to inform users that content has been removed be liable to compensate the harm that is caused to the user as a result; and
- a court be able to issue an injunction at the request of a user or a user organisation against a service for failing to comply with the two obligations above or for inadequate redress mechanisms.

"Why should you want to know? Don't you mind about the future?" Andrew Lloyd Webber and Tim Rice have once raised these questions. Indeed, wrapping up the implementation history of Article 17 in the four selected Member States might help anyone understanding the successes and pitfalls of one of the most complex provisions of EU copyright law ever, and to realize what's a-happening in the other countries, where, like in Sweden, the game has just begun…

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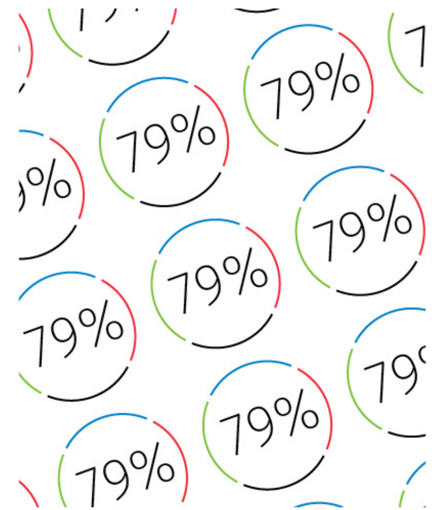

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