

# Kluwer Copyright Blog

## European Copyright Society (ECS): Comment on Copyright and the Digital Services Act Proposal

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On 15 December 2020, the European Commission submitted a [proposal for a Regulation on a Single Market For Digital Services](#) (Digital Services Act, DSA) and amending Directive 2000/31/EC. In November 2021, the Council of the European Union reached agreement on an amended version of this proposal, and on 20 December 2021, the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO) released a [draft for an EP legislative resolution](#). The legislative project “seeks to ensure the best conditions for the provision of innovative digital services in the internal market, to contribute to online safety and the protection of fundamental rights, and to set a robust and durable governance structure for the effective supervision of providers of intermediary services”. To achieve these aims, the DSA sets out numerous due diligence obligations of intermediaries concerning any type of illegal information, including copyright infringing content.

Copyright enforcement online is a major issue in the context of the DSA, and the DSA will be of utmost importance for the future of online copyright in the EU. Against this background, the European Copyright Society (ECS) issued on 17 January 2022 a [comment](#) on “Copyright and the Digital Services Act”. We reproduce below the Executive Summary of that comment.

## EXECUTIVE SUMMARY

Copyright law accounts for most content removals from online platforms and search engine result lists, by an order of magnitude. This practice will become subject to numerous due diligence obligations under the proposed Regulation on a Single Market For Digital Services (Digital Services Act, DSA), which also covers copyright infringing content. In this Comment, the European Copyright Society (ECS) takes the opportunity to share its view on (1) the relationship between the EU copyright acquis and the DSA and (2) on further selected aspects of the DSA from a copyright perspective.

The most challenging question regarding the relationship between the DSA and the copyright acquis concerns “online content sharing service providers” (OCSSPs), which are subject to the *lex specialis* regime of Art. 17 of the Copyright in the Digital Single Market Directive (CDSMD). There are two categories of rules in the DSA that will apply to OCSSPs’ copyright moderation activities, namely DSA rules regulating matters not addressed in Art. 17 CDSMD, and DSA rules on issues that Art. 17 CDSMD touches upon but in relation to which it is not as detailed as the DSA and leaves Members States with a margin of discretion. As an example for the latter scenario, we show that the copyright concept of “a sufficiently substantiated notice” to trigger a takedown will arguably be subject to the more specific rules on notice and action mechanisms under Art. 14 DSA.

A critical assessment of selected DSA provisions from the perspective of EU copyright law reveals several issues that deserve attention in the ongoing legislative process:

- The status of search engine providers as addressees of the DSA should be clarified. It is submitted that the DSA should be complemented with tailor-made, medium-level due diligence obligations for search engines.
- The DSA definition of what dissemination of information counts as “public” differs from that of the copyright acquis. To ensure consistency, Art. 2(h) DSA could incorporate the more flexible and functional concept of “public” as developed in the case law of the CJEU concerning the right of communication to the public.
- Regarding the legality of preventive, in particular automated content moderation activities, we call for a consideration of the fundamental rights concerns raised both by the Commission and Advocate General Saugmandsgaard Øe in the context of Art. 17 CDSMD.
- The implementation and enforcement Chapters of the DSA also deserve reconsideration when looked at from a copyright perspective.
  - The enforcement provisions of the DSA do not address the interests of all actors involved in a balanced, symmetric way, and we suggest several measures to ensure effective representation of uploaders, inter alia by recognising Trusted Content Creator initiatives as counterparts to Trusted Flaggers (Art. 19 DSA).
  - It should be clarified that copyright infringements do not justify a temporary restriction of access to a service under Art. 41(3)(b) DSA.
  - We call for a clarification whether the DSA regulates the enforcement of intermediaries’ obligations conclusively or whether a failure of an intermediary to comply with the DSA can trigger private claims on other legal grounds including general tort and unfair competition law.
  - Finally, we stress that national authorities with DSA competences need to possess expertise in copyright law, freedom of expression and a comprehensive understanding of creator and user contexts.

*The European Copyright Society (ECS) was founded in January 2012 by academics with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. It has published numerous opinions on the interpretation and development of copyright law in the European Union. The Society is not funded, nor has been instructed, by any particular stakeholders. All ECS opinions are archived here: <https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/>.*

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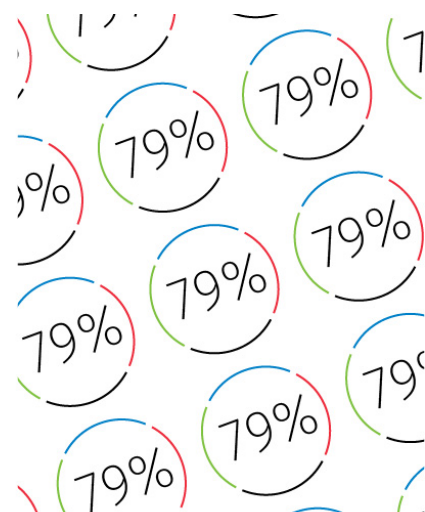
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