

Kluwer Copyright Blog

Article 17 DSM Directive: the Swedish proposal (Part 1)

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As promised in an [earlier contribution](#), I will provide a more reasoned exploration of the Swedish proposal to Article 17 DSM Directive in view of the fact that the Ministry of Justice did not opt for the copy-paste implementation technique. In this first post, out of two, I will address the proposed liability regime. The second post will focus on provisions explicitly directed to users of services.



A Swedish harbour, internationally renowned for [whiskey on the rocks](#); Jonas Helmersson/Swedish Armed Forces

The Ministry of Justice [published its vision for implementation of the Directive](#) and especially its Article 17 on 8 October 2021, with changes proposed to take effect on 1 July 2022. Whether this proposal will be accepted by the Government is a question that was initially scheduled to be known on 5 April 2022 ([position 36](#)). But with the CJEU now being reported to deliver later in April its judgment in *Poland v EP and Council*, in which Poland challenges the core of the provision on fundamental rights grounds, waiting for the Court seems like an appropriate course of action.

Of course, the Directive was supposed to be transposed by 7 June 2021 so publishing a proposal in October seems late. However, ever since May 2019 the Ministry has worked hard to deliver a product that works in the real world and even set up a working group initially consisting of not less than 80 different actors the same month. As I described it in the earlier post, the proposal is a three-course meal, not a two-year old hot potato warmed up in the microwave. However, to arrive at the conclusion that Sweden has not implemented Article 17 yet is not entirely correct. I will get back to this point at the very end of the second post.

1. Hors d'oeuvre: deconstructed Article 17 served on traditional copyright law principles

1.1 General approach to implementation of Article 17 and main features

The benefit of the Ministry's virtuous approach to patiently let events unfold during 2020 and 2021 is that its proposal observes the CJEU's precedent in *YouTube/Cyando*, AG Øe's Opinion in *Poland v EP and Council*, as well as the Commission's own [guidance](#); Accordingly, whilst the Ministry explicitly recognises that Article 17 is complicated, unclear, and internally inconsistent, the view is that there is every reason to be attentive of the AG's and the Commission's understanding, even if the guidance is not binding and the CJEU might construe the relevant provisions differently than the AG (Ds 2021:30, pp. 133-134). In this respect the Ministry identifies a common denominator between the guidance and the AG's opinion that seems to characterise the overall proposed approach to Article 17; namely that both the Commission and the AG attribute significant weight to fundamental rights considerations.

The end result is a proposal to introduce a special regime in a new Chapter 6b of the Copyright Act with a constrained scope of application, consisting of sections 52i-52u (that's thirteen provisions) which follow the requirements of Article 17 and go beyond its literal confines for the benefit of everyone involved.

1.2 Services covered and default liability regime

The introductory section 52i aims to implement Article 2(6) DSM Directive, while the subsequent section 52j contains the default liability provision, intending to implement Articles 17(1) and (3). It is useful to treat the provisions together here.

Differently from the contents of Article 2(6), rather than enumerating which services fall outside its ambit, the Swedish Ministry of Justice opts for a concise definition that only explains which services the regime does cover, on the basis of the first paragraph of Article 2(6) and recitals 62 and 63 cumulatively (anchoring this approach in the Commission's guidance, p. 4). Accordingly, the proposed Chapter 6b applies to information society services of which the main purpose is to store and give the public access to large amounts of protected subject matter uploaded by its users, *if* (1) the service organises and promotes the protected subject matter for profit-making purposes, *and* (2) the service plays an important role on the content market by competing with other types of online content services [that is, competes with such services to which users do not upload their own content]. The subsequent section 52j then goes on to succinctly clarify that when users upload protected subject matter to the service, the service provider is considered to communicate such subject matter to the public pursuant to section 2(3)(1) Copyright Act (which implements Article 3 InfoSoc Directive) and excludes the hosting safe harbour in section 18 E-Commerce Act for the targeted services (Article 14 E-Commerce Directive).

“So far so good” could think the lawyer preferring a verbatim implementation technique that considers recitals. But the proposed regime is intended to only cover uses which fall within the **making available** prong of the communication to the public right, and therefore excludes live transmissions, *while also not covering linking*. Accordingly, services which mainly offer live transmission or linking functionality fall outside the scope of the regime. The Ministry bases its

assessment on the definition of a service and the Commission's guidance, referring in this part of the proposal to page 5 of the guidance (Ds 2021:30, p. 138). Crucial for this narrower understanding is the requirement in Article 2(6) that the service *stores* protected subject matter uploaded by the users. According to the Ministry, storage of content on a service implies storage which is not transient and so cannot include linear transmissions. In addition, since storage of protected subject matter amounts to...storage of protected subject matter, it cannot extend over links because these are not protected by copyright.

One can perhaps be baffled by this narrower scope of applicability given the wording of the proposed provision which does indeed refer to *communication to the public*. But this divergence is intended. As the structure of the national rights catalogue mirrors Article 3 InfoSoc Directive, it is after all the communication to the public *right* which is the exclusive right at stake, even if the exploitation takes the form of making available. At the same time, the Ministry is well-aware of the dynamic that surrounds the interpretation of Article 3 InfoSoc Directive and to allow for any future developments, it seems it simply makes more sense to provide the space as a matter of legislative draftsmanship. This way, and if the Government eventually follows the same line, changes to the Copyright Act will not have to be made in the event that the Ministry's narrower understanding is for some reason to be rejected (Ds 2021:30, pp. 141-142).

Given the structured design of Article 17, one would then expect a provision obliging services, in line with Article 17(2), to obtain authorisation. But an unequivocal confirmation of the existence of a copyright-relevant act in the proposed section 52j then obviously means that the service needs to obtain authorisation for the act or cease it. Against this backdrop the Ministry feels that there is no need to state the obvious in the text of the Copyright Act. Imposing an obligation of this kind will moreover give the impression that it is absolute in scope, which, given the remaining components of Article 17, it clearly is not (Ds 2021:30, pp. 144-145). Instead, the new Chapter moves on to section 53k which builds on the previous provision and simply clarifies that *if* a service already has authorisation, it extends to the relevant [making available] acts carried out by the user.

2. Le plat principal: a new safe harbour complemented with obligatory side dishes

2.1 New safe harbour

With the liability question being settled in the opening provisions, the Ministry then serves a new safe harbour in section 52l (that's an L), consisting of three cumulative prongs, which is intended to transpose in one go Articles 17(4), (5) and partly (7). The driving force behind the Ministry's proposal is the preference for flexible standards to govern the three prongs that make compliance as simple and comprehensible as possible for the service. The result is a rather lenient duty of care to benefit from the safe harbour, whose construction is additionally affected by a self-standing *obligation* to not prevent lawful uses (comes further below).

Starting with the wording of the safe harbour, the first prong targets ongoing (individual) infringements requiring *ex post* intervention. In particular, a service provider is proposed to not be liable for unlawful **communications** to the public (i.e. making available) *if* the provider, having received a *sufficiently substantiated* ("well-substantiated") *notification* from rightholders, expeditiously disables access to protected content. The onus of having to act commences the moment *such* a notification is submitted and is anchored in the contents of that notification. The

notification needs to contain information that allows a service to take a justifiable and diligent decision by describing why the act is to be considered unlawful and point out where exactly the content is located. In case of doubt, the service may require evidence of rights ownership, but is not expected to make complicated assessments of whether an exception is applicable or not; it being instead required to act in clear infringement situations (Ds 2021:30, pp. 158, 288). Elsewhere in the proposal the Ministry even goes as far as to recognise that the applicability of an exception is often difficult to establish even by a lawyer with special competence in the area (Ds 2021:30, p. 156).

The second and third prongs then require of services to act towards rightholders as a collective. They require services to *take such measures that they can reasonably be required to take* (sv. *vidta de åtgärder som skäligen kan krävas*; cf. ‘best efforts’) to, on the one hand, obtain necessary authorisation for the relevant acts that the service providers carry out on their service (second prong), and, on the other, to intervene *ex ante* by ensuring that unlawful content, about which the service has received relevant and necessary information from rightholders that essentially enables content matching, is not made available on the service (third prong). Expecting every conceivable service falling under the regime to procure expensive identification technology is, however, not the intention (Ds 2021:30, p. 155).

The small-services exception in Article 17(6) is proposed to be integrated into the proposed safe harbour through section 52m as an exception to the cumulative prongs of the safe harbour. For the safe harbour to be applicable to these services, it suffices that they comply with the first and second prong.

2.2 Obligation to protect lawful use and how it affects the safe harbour

As a counterweight to the safe harbour, section 52o, partly implementing Article 17(7), requires of services to have effective routines to ensure that any measures taken to disable access to content pursuant to the safe harbour do not prevent legal **communications to the public** to any significant degree (sv. *i någon påtaglig omfattning*), and that methods for automatic blocking can only be used to disable access to content which can be assumed with a high degree of certainty to infringe copyright.

Throwing at services obligations placed at opposite ends will of course make the national implementation as ambiguous as Article 17. To avoid it, the Ministry proposes to incorporate the obligations in section 52o also in the safe harbour provision, which inevitably affects the construction of the safe harbour. Notably, the third and last paragraph of the safe harbour in section 52l clarifies that any measures that the provider must take to remain within the safe harbour do not prejudice compliance with the obligations in section 52o. For this to work, the obligations in 52o therefore have to affect the assessment of whether the measures that a service can be expected to take or has taken are compliant with the safe harbour; both with regards to the substance of the notification regarding *ex post* intervention and the *reasonability* assessment regarding *ex ante* intervention.

The practical significance is that service providers are expected to, if they wish to benefit from the safe harbour, disable access to unlawful content but *provided* that the measures taken do not prevent lawful use or use that falls into the grey area (Ds 2021:30, p. 156 regarding *ex ante* and p. 158 regarding *ex post* intervention). This prioritises users, which the Ministry also makes clear by

stating explicitly that users' interest of not having access to lawful content disabled shall come before the requirement to disable access to unlawful content (Ds 2021:30, p. 156). In other words, the requirement to prevent access to unlawful content is not absolute (Ds 2021:30, p. 157). In light of this, the statement in the provision whereby measures must not prevent legal communication 'to any significant degree' should be construed as a safety net that primarily gains relevance vis-à-vis specific user safeguards (addressed in Part 2 of this post).

2.3 Obligation(s) to provide information

In the event that access to content is disabled, the second paragraph of section 52o requires of services to expeditiously notify the relevant *user* that this has taken place. But beyond this obligation, section 52n, which implements and expands part of Article 17(8), requires of a service to provide *on request* from a rightholder *as well as* from a user information on measures that are taken pursuant to the proposed safe harbour. Whilst 52n corresponds to the second paragraph of Article 17(8) as far as *rightholders* are concerned, in case of users the requirements of sections 52n and 52o taken together mean that users are envisaged to be able to comprehend what technology is being used by services and then be notified when that technology has actually been used.

2.4 Complaints procedure

Lastly, partly implementing Article 17(9) the proposed section 52q introduces a complaints procedure in which complaints must be decided expeditiously and no later than within 7 days. But without itemising all the different components of Article 17(9) the provision requires of services in general terms to simply have routines to be able to handle complaints from users when access to content has been disabled.

However, the provision then goes on to switch the burden onto the rightholder. In particular, whilst the relevant rightholder is entitled to address the complaint, they are also expected to duly justify (*sv. vederbörligen motivera*) the request to disable access. And if the request is not duly justified, the section then requires that access to the content be restored. Like the safe harbour, the service must not continue preventing access to content in uncertain situations, such as where it is difficult to determine if an exception applies (Ds 2021:30, p. 300). Human review, then, must precede only a decision to *not* restore access to content.

Considering all of these components together, one can imagine how a national transposition of Article 17 finishes here. But like any three-course meal, it should end with a dessert. This is, however, a dish for another post.

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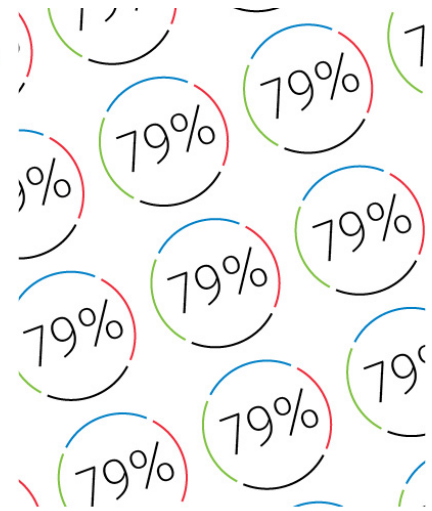
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